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SUPREME COURT, U.S.

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1983

NO. _____

83-5354

TONY B. AMADEO,

Petitioner

v. ®

ROBERT O. FRANCIS,
WARDEN, GEORGIA
DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF GEORGIA

JOHN R. MARTIN
MARTIN and YOUNG
504 The Grant Building
44 Broad Street, N.W.
Atlanta, Georgia 30303
(404) 522-0400

WILLIAM M. WARNER
504 The Grant Building
44 Broad Street, N.W.
Atlanta, Georgia 30303
(404) 522-0880

ATTORNEYS FOR PETITIONER

QUESTION PRESENTED FOR REVIEW

WHETHER THE PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED TO HIM BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION IN THAT THE PETITIONER'S TRIAL COUNSEL FAILED TO CHALLENGE THE GRAND AND PETIT JURY COMPOSITION PRIOR TO THE TRIAL OF THE PETITIONER IN PUTNAM COUNTY, GEORGIA.

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ROBERT O. FRANCIS,
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PETITION FOR WRIT OF CERTIORARI TO THE
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BRIEF OF PETITIONER

The Petitioner, TONY B. AMADEO, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Georgia rendered on June 21, 1983, which denied his application for a certificate of probable cause to appeal the denial of habeas corpus relief, sought in Butts County, Georgia.

OPINIONS BELOW

The opinion of the Supreme Court of Georgia was entered on June 21, 1983, and is attached hereto as Appendix A. The Petitioner's Motion for Rehearing was denied by the Supreme Court of Georgia on July 7, 1983.

JURISDICTION

The judgment of the Supreme Court of the State of Georgia was entered on June 21, 1983, and is set out in Appendix A. A Motion for Rehearing was filed and denied on July 7, 1983. Jurisdiction of this Court is invoked under 28 U.S.C. 1257(3), the Petitioner having asserted below, and asserting here, deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment, United States Constitution:

No person...shall be...deprived of life,
liberty, or property, without due
process of law;...

Sixth Amendment, United States Constitution:

In all criminal prosecutions, the accused
shall...have the assistance of counsel for
his defense.

Fourteenth Amendment, United States Constitution:

...nor shall any State deprive any person
of life, liberty, or property, without due
process of law;...

O.C.G.A. §9-14-51 (Ga. Code Ann. §50-127(10))

All grounds for relief claimed by a petitioner
for a writ of habeas corpus shall be raised by
a petitioner in his original or amended
petition. Any grounds not so raised are
waived unless the Constitution of the United
States or of this state otherwise requires or
unless any judge to whom the petition is
assigned, on considering a subsequent
petition, finds grounds for relief asserted

therein which could not reasonably have been raised in the original or amended petition.

STATEMENT OF THE CASE

The Petitioner, TONY B. AMADEO, was accused of shooting James D. Turk, Sr. during the course of an attempted armed robbery on September 29, 1977, in Putnam County, Georgia, thereby causing Mr. Turk's death.

On November 30, 1977, the Petitioner was convicted of the capital felony of murder and of the felony of criminal attempt to commit armed robbery. The Petitioner was sentenced to the death penalty on the charge of murder and was sentenced to a term of 10 years on the charge of criminal attempt to commit armed robbery. A motion for New Trial was filed on December 21, 1977, and overruled on September 18, 1978, by the trial court. Notice of Appeal was filed on behalf of the Petitioner on October 17, 1978, and the appeal was docketed with the Supreme Court of Georgia on November 28, 1978.

The Georgia Supreme Court affirmed the Petitioner's conviction and sentence in a decision rendered on May 2, 1979, Amadeo v. The State, 243 Ga. 627 (1979). On May 29, 1979, the Petitioner's Motion for Rehearing was denied by the Georgia Supreme Court.

On January 30, 1980, a Petition for Habeas Corpus was filed in the Superior Court of Putnam County, Georgia, requesting an evidentiary hearing. On February 29, 1980, this petition was summarily denied by the trial court in Putnam County. On March 28, 1980, the Petitioner filed an Application for a Certificate of Probable Cause. This application was denied by the Georgia Supreme Court on September 10, 1980. A

Motion for Rehearing was subsequently denied on September 24, 1980. Subsequent to the Petitioner's trial and conviction, the entire jury lists involved in his indictment and trial were found to be unconstitutionally composed as a matter of fact and law by the United States District Court for the Middle District of Georgia in the case of Willie Bailey, et al v. Roy L. Vining, et al, Ga. No. 76-199-MAC. This jury composition issue was raised in the original state habeas corpus action filed by the Petitioner in his place of incarceration at the time, Putnam County, Georgia.

The Petitioner subsequently filed a petition for writ of certiorari in the United States Supreme Court to attempt to redress the denial of his petition in the Georgia Supreme Court. The petition was subsequently denied by an order of the United States Supreme Court dated March 30, 1981. On May 18, 1981, the petition for rehearing was denied.

On June 8, 1981, the Petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody in the United States Court for the Middle District of Georgia. The Honorable Wilbur D. Owens, Jr. issued an order on September 22, 1982, dismissing the Petitioner's habeas without prejudice and leaving him with the choice of returning to the state courts to exhaust his ineffective assistance of counsel claim as it relates to the jury composition issues or of amending and resubmitting the habeas petition to present only the exhausted claims before the district court.

The Petitioner then filed a habeas corpus action in Butts County, Georgia, raising the issue that was singled out by the United States District Court. The trial court subsequently dismissed the Petitioner's habeas corpus action on March 16, 1983. An Application for a Certificate of Probable Cause to appeal this denial was denied by the Georgia

Supreme Court on June 21, 1983. A subsequent motion for rehearing on this matter was denied on July 7, 1983. It is from this denial that the Petitioner presently seeks relief before this Honorable Court.

REASONS FOR GRANTING THE WRIT

ISSUE RAISED IN STATE HABEAS CORPUS PROCEEDING:

WHETHER THE PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED TO HIM BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION IN THAT THE PETITIONER'S TRIAL COUNSEL FAILED TO CHALLENGE THE GRAND AND PETIT JURY COMPOSITIONS PRIOR TO THE TRIAL OF THE PETITIONER IN PUTNAM COUNTY, GEORGIA.

The Petitioner maintains that the two jury lists, both grand and petit, involved in his indictment and trial were unconstitutionally composed in violation of his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution. The jury lists and box from which the grand and trial juries in this case were drawn were found to be unconstitutionally composed as a matter of fact and law by the United States District Court for the Middle District of Georgia in the case of Willie Bailey, et al. v. Roy L. Vining, et al., Case No. 76-99-MAC. The defect was a violation of the applicable Georgia law, Georgia Code Annotated Section 59-108, as well as a violation of United States Supreme Court decisions.

The conclusion from this case makes it very clear that the jury source involved in the Petitioner's case was tainted, as the list and box were not constitutionally valid.

The Court found in the Bailey case, supra, that there had been intentional underrepresentation of blacks and women, which amounted to systematic exclusion of discreet groups in the community.

The central issue out of which the present ineffective assistance of counsel ground springs, the jury composition issue, has been in the forefront of Petitioner's appeals since the initial appellate stages of Petitioner's case where other trial counsel were involved. The ineffective assistance of counsel aspect of the composition issue was first pressed in the Petitioner's federal habeas corpus action. The United States District Court for the Middle District of Georgia ordered the ineffective assistance of counsel aspect of the jury composition issue sent back to the state habeas court so that it could make an initial determination with regard to that aspect of Petitioner's claims. The Petitioner would respectfully submit that the action of the District Court in sending the petition back to the state rather than ordering the Petitioner the sole choice of amending out the alleged unexhausted claim is an indication that it wanted to afford the Petitioner the opportunity to have this claim considered at the state court level.

The real issue involved in the case is jury composition, and the ineffective assistance of counsel claim is simply another appropriate way to have the basic judicial structure, under which the defendant was tried and given the death penalty in this case, constitutionally tested.

The state in its opposition to the Petitioner's habeas corpus action has cited the case of Dix v. Zant, 249 Ga. 810 (1982). That case is clearly distinguishable from the Petitioner's case in that the ineffective assistance of counsel claim that was raised in a subsequent habeas did not relate to the very vital issue of jury composition, which is clearly

present in the Petitioner's case.

In Goodwin v. Balkcom, Case No. 81-7132, decided September 3, 1982, the United States Court of Appeals for the Eleventh Circuit held that where trial counsel's ineffective assistance, evidenced by his lack of thorough investigation, deprived the defendant of a potential defense and, additionally, the decision to raise what would have been a creditable challenge to the composition of the grand jury was unperceived, the prisoner was entitled to relief in a habeas corpus action. In this case the United States Court of Appeals for the Eleventh Circuit reached the vital issue on the merits that this Honorable Court needs to reach in regard to the Petitioner.

In Dix v. Zant, *supra*, the Court held that a subsequent habeas corpus petition would not effect a waiver if the judge presiding found other grounds in the subsequent petition which could not reasonably have been raised in the original petition or amended petition that was filed. The Petitioner's position has always been that the jury composition issue was not waived by the failure of his counsel to assert it prior to trial because of the system of discrimination that was practiced by the state under the findings in the Bailey case, *supra*. In that case, the District Court held, in effect, that the system of discrimination practiced was a very ingenious form of discrimination which was aimed at avoiding detection. This form of state action was clearly violative of the Petitioner's right to be indicted by a properly composed grand jury and to be tried by a properly composed petit jury. This factual situation led to a position in which the habeas court, under the terms and provisions of O.C.G.A. §9-14-51 (Michie 1982); Ga. Code Ann. §50-127(10) (Harrison 1977), on consideration of the subsequent habeas should have found that the ground for

relief asserted therein was not waived by the failure to specifically set it out in all its particularities in the original habeas petition. The failure of the habeas court to so hold was an abuse of discretion that amounts to state action depriving the Petitioner of vital constitutional rights.

The Petitioner was denied the effective assistance of counsel as guaranteed to him by the sixth and fourteenth amendments to the United States Constitution. The particular allegation relates to the failure of the Petitioner's trial counsel to challenge the grand and petit jury composition prior to the trial of the Petitioner in Putnam County, Georgia. The Georgia Supreme Court held in Amadeo v. The State, 243 Ga. 627 (1979), in the Petitioner's direct appeal that the challenge to the jury composition was without legal merit solely because it came too late. The Petitioner challenges the legal propriety of this ruling. If in fact as a matter of law the challenge came too late, then the Petitioner would maintain that there is a prima facie case made out, by the record, of ineffective assistance of counsel, because his trial counsel did not attempt in any fashion to challenge the jury composition in Putnam County, Georgia before trial. This inaction was violative of his sixth amendment rights to the effective assistance of counsel under the United States Constitution. The jury panels from which the Petitioner was indicted, tried, convicted and sentenced to death have been held by the United States District Court for the Middle District of Georgia to be unconstitutionally composed. The Petitioner desires to have this Honorable Court address the ineffective assistance of counsel allegation in regard to the jury issues.

The present counsel for the Petitioner took over the defense of this case just shortly before the case was originally decided on direct appeal in the Georgia Supreme

Court in Amadeo v. The State, supra. The argument that counsel made in the original habeas corpus petition that was filed in Putnam County was an attempt to be consistent with the very proper argument of nonwaiver of the challenge to the grand and petit jury lists because of the form of discrimination that was practiced in Putnam County prior to the arraignment and trial of the defendant there. To the extent counsel should have raised the ineffectiveness aspect of this argument more specifically in the state habeas proceedings, then present counsel would say that he was ineffective in not raising the issue in this manner at an earlier time. The Petitioner has been given the death penalty and the state intends to carry this forward by its means of electrocution. The Petitioner simply wants his claim that he was improperly indicted and tried by unconstitutionally composed grand and petit juries decided on the merits.

The Petitioner would submit that these claims could not have reasonably been raised at any earlier time consistent with his original position. The legal importance to the Petitioner of having this decided on the merits in this death penalty case is monumental. The Petitioner would maintain that he has not waived his claim that is raised by this habeas corpus petition under the terms and provisions of O.C.G.A. §9-14-51 (Michie 1982); Ga. Code Ann. §50-127(10) (Harrison 1977), that all relief prayed for in the Petitioner's habeas corpus petition should be granted by this Honorable Court.

In Gardner v. Florida, 430 U.S. 349, 51 L.Ed.2d. 393, 97 S.Ct. 1197 (1977), this Court fully recognized that the death penalty is a peculiar breed of sentence when it said:

First, five members of the Court have now expressly recognized that death is a different kind of punishment from any other which may be imposed in this country. Gregg v. Georgia,

428 U.S. 153, 181-188, 49 L.Ed.2d 859,
96 S.Ct. 2909 (opinion of Stewart, Powell
and Stevens, JJ.); see id., at 231-241
(Marshall, J., dissenting); Furman v. Georgia,
408 U.S. at 286-291, 33 L.Ed.2d 346, 92 S.Ct.
2726 (Brennan, J., concurring), 306-310, 33
L.Ed.2d 346, 92 S.Ct. 2726 (Stewart, J.,
concurring); see id., at 314-371, 33 L.Ed.2d
346, 92 S.Ct. 2726 (Marshall, J., concurring).
From the point of view of the defendant, it is
different in both its severity and its
finalty. From the point of society, the action
of the

(430 U.S. 358)

sovereign in taking the life of one of its
citizens also differs dramatically from any
other legitimate state action. It is of vital
importance to the defendant and to the
community that any decision to impose the
death sentence be, and appear to be, based
on reason rather than caprice or emotion.

The Petitioner respectfully implores this Honorable
Court to take the above cited language from Gardner, supra,
into account and to give it ample and weighty consideration
in its decision on the legal propriety of the Georgia Supreme
Court's affirmance of the death penalty in Petitioner's case.

CONCLUSION

For the within and foregoing reasons, a Writ of
Certiorari should issue to review the judgment and opinion of
the Georgia Supreme Court in its denial of the Petitioner's

Application for a Certificate of Probable Cause to appeal the
dismissal of his habeas corpus action by the trial court in
Butts County, Georgia.

Respectfully submitted,

MARTIN and YOUNG

BY:

John R. Martin
JOHN R. MARTIN

504 The Grant Building
44 Broad Street, N.W.
Atlanta, Georgia 30303
(404) 522-0400

William M. Warner
WILLIAM M. WARNER

504 The Grant Building
44 Broad Street, N.W.
Atlanta, Georgia 30303
(404) 522-0880

IN THE SUPREME COURT
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82-5354

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v.

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GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent.

CASE NO. _____

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Office of The Clerk
SUPREME COURT, U.S.

MOTION FOR LEAVE TO
PROCEED IN FORMA PAUPERIS

The Petitioner, TONY B. AMADEO, who is now confined to the Georgia Diagnostic and Classification Center, a state prison located in Jackson, Georgia, and who is under a sentence of death, asks leave to file the attached Petition for a Writ of Certiorari to the United States Supreme Court without prepayment of costs and proceed in forma pauperis pursuant to Rule 53.

The Petitioner's Affidavit in support of this motion is attached hereto.

MARTIN and YOUNG

BY: John R. Martin

JOHN R. MARTIN

504 The Grant Building
44 Broad Street, N.W.
Atlanta, Georgia 30303
(404) 522-0400

IN THE SUPREME COURT
FOR THE UNITED STATES

TONY B. AMADEO,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

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*
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*
*
*

CASE NUMBER _____

PAUPER'S AFFIDAVIT

TONY B. AMADEO, Petitioner, being duly sworn, deposes and says:

(1) I am a citizen of the United States and the Petitioner in the above-entitled action.

(2) I desire to prosecute a review of the judgment entered by the Supreme Court of the State of Georgia on June 21, 1983, and affirmed on rehearing on July 7, 1983, pursuant to 28 U.S.C. §1257(3), but because of my poverty, I am unable to pay the costs of such a review.

(3) I believe I am entitled to the redress I seek by such a review, and that such a review presents substantial issues of deprivation of rights secured by the Constitution of the United States.

The nature of the question to be presented upon such a review is as follows:

WHETHER THE PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED TO HIM BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION IN THAT THE PETITIONER'S TRIAL COUNSEL FAILED TO CHALLENGE THE GRAND AND PETIT JURY COMPOSITION PRIOR TO THE TRIAL OF THE PETITIONER IN PUTNAM COUNTY, GEORGIA.

I contend that the Supreme Court of Georgia erred in upholding my conviction and sentence.

WHEREFORE, Affiant prays that he may have leave to proceed in this Court on Petition for Writ of Certiorari in forma pauperis.

Tony B. Amadeo
TONY B. AMADEO

Sworn to and subscribed before
me this 31 day of August,
1983.

Allen W. Kiger
Notary Public
My Commission Expires
9-20-83

Application No. 2464

SUPREME COURT OF GEORGIA

ATLANTA, June 21, 1983

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

TONY B. AMADEO V. ROBERT O. FRANCIS, WARDEN

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA.

CLERK'S OFFICE, ATLANTA.

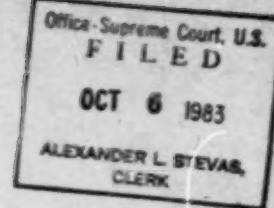
I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Yvonne B. Williams Clerk

APPENDIX A

NO. 83-5354



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OCTOBER TERM, 1982

TONY B. AMADEO,

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ROBERT O. FRANCIS, WARDEN,
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Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

SUSAN V. BOLEYN
Assistant Attorney General
Counsel of record for
the Respondent

MICHAEL J. BOWERS
Attorney General

JAMES P. GOOGE, JR.
Executive Assistant
Attorney General

MARION O. GORDON
First Assistant
Attorney General

Please serve:

SUSAN V. BOLEYN
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3397

WILLIAM B. HILL, JR.
Senior Assistant
Attorney General

QUESTION PRESENTED

Whether Petitioner waived his right under state law to raise the issue of alleged ineffective assistance of counsel for the failure of his trial attorney to challenge the composition of the grand and traverse juries prior to trial?

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

PART ONE

STATEMENT OF FACTS

Petitioner, Tony B. Amadeo, was tried and convicted for the offense of murder and criminal attempt to commit theft in the Superior Court of Putnam County on November 30, 1977. Petitioner received the death penalty for the offense of murder and a ten year sentence for the offense of criminal attempt to commit theft. A motion for new trial filed on Petitioner's behalf on December 21, 1977, was overruled by the Superior Court of Putnam County, Georgia on September 18, 1978.

Petitioner appealed to the Supreme Court of Georgia which affirmed his convictions and sentences in Amadeo v. State, 243 Ga. 627, 256 S.E.2d 382 (1979). A motion for rehearing filed in the Supreme Court of Georgia on behalf of the Petitioner was denied on May 29, 1979. A petition for a writ of certiorari to this Court was denied on November 26, 1979, with the petition for rehearing being denied by this Court on January 21, 1980.

Following the denial of his petition for a writ of certiorari by this Court, Petitioner filed a petition for a writ of habeas corpus in the Superior Court of Putnam County, Georgia on January 30, 1980. Petitioner was denied relief by that court on February 29, 1980. Petitioner filed an application for a certificate of probable cause to appeal to the Supreme Court of Georgia which application was denied on September 10, 1980. A motion for rehearing was denied by the Supreme Court of Georgia on September 24, 1980. A petition for a writ of certiorari to this Court was denied on March 30, 1981, with a motion for rehearing being denied on May 18, 1981.

Next, Petitioner filed an application for federal habeas corpus relief pursuant to 28 U.S.C. § 2254 in the United States District Court for the Middle District of Georgia, Macon Division on June 8, 1981. On September 22, 1982, the district court dismissed the application for federal habeas corpus relief without prejudice for failure to exhaust state remedies with respect to the claim now raised in this petition for a writ of certiorari. The court stated:

While this petitioner has previously asserted to the courts of this State upon appeal and by a state habeas corpus petition that the grand and petit jury lists were unconstitutionally composed,

the petitioner has not claimed in any state court proceeding the denial of the effective assistance of counsel guaranteed to him by the Sixth and Fourteenth Amendments to the Constitution of the United States. (cites omitted).

(Appendix A, p. 2).

Petitioner then filed a second petition for a writ of habeas corpus in the Superior Court of Butts County, Georgia on October 25, 1982, alleging that his trial counsel rendered ineffective assistance of counsel so as to violate Petitioner's rights under the Sixth and Fourteenth Amendments to the Constitution of the United States. The ineffective assistance of counsel allegation was that trial counsel had improperly failed to challenge the composition of the grand and petit jury in Putnam County, Georgia. Counsel for Respondent filed a motion to dismiss asserting that this second petition for a writ of habeas corpus was successive under Georgia law as contained in O.C.G.A. § 9-14-51 and under such decisions of the Supreme Court of Georgia as Dix v. Zant, 249 Ga. 810 294 S.E.2d 527 (1982).

A hearing was conducted in the Superior Court of Butts County, Georgia, on the issue of whether this subsequent state habeas corpus petition constituted a successive petition within the meaning of O.C.G.A. § 9-14-51, thereby rendering the allegation raised in the petition as having been waived under state law. The Superior Court of Butts County, Georgia entered an order dated March 16, 1983, determining that this subsequent petition filed on behalf of Petitioner was successive in nature and granted Respondent's motion to dismiss.

Petitioner appealed the judgment of the Superior Court of Butts County, Georgia to the Supreme Court of Georgia by filing an application for a certificate of probable cause to appeal. The application for a certificate of probable cause to appeal was denied by the Supreme Court of Georgia on June 21, 1983 and a motion for reconsideration filed with respect to the application on behalf of the Petitioner was denied on July 7, 1983.

It is from these orders of the Supreme Court of Georgia that Petitioner now seeks review from this Court.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

THE SUPREME COURT OF GEORGIA
PROPERLY REFUSED TO REVIEW THE
QUESTION RAISED BY PETITIONER ON
AN ADEQUATE AND INDEPENDENT STATE
GROUND.

Petitioner contends that he was denied the effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution in that his trial attorney failed to challenge the grand and petit jury composition prior to Petitioner's trial in Putnam County, Georgia. As has already been noted, this issue was raised for the first time in Petitioner's application for federal habeas corpus relief and was remanded by the federal district court to the state courts for exhaustion of this claim. (Appendix A). Petitioner filed a second state habeas corpus petition raising this claim and counsel for the Respondent filed a motion to dismiss this petition on the grounds that the petition for a writ of habeas corpus was successive under state law as contained in O.C.G.A. § 9-14-51 and in such Georgia case law as that contained in Dix v. Zant, 249 Ga. 810, 294 S.E.2d 527 (1982).

A hearing was conducted in the Superior Court of Butts County, Georgia on the issue of whether this subsequent state habeas corpus petition constituted a successive petition under state law as contained in O.C.G.A. § 9-14-51, thereby rendering the allegation raised in the petition as being waived under state law. The Superior Court of Butts County noted that in Dix v. Zant, 249 Ga. 810, 294 S.E.2d 527 (1982), the Supreme Court of Georgia had concluded that if a ground raised in a second or successive habeas corpus petition was not raised in the

initial petition for a writ of habeas corpus, said ground is waived, with two statutory exceptions. The first exception is where the state or federal constitution provides otherwise and the second is where the ground raised only in the second or subsequent petition could not reasonably have been raised in the original or amended petition.

The state habeas corpus court properly followed the holding of the Supreme Court of Georgia in Smith v. Zant, 250 Ga. 645, 301 S.E.2d 32 (1983), that the threshold inquiry must be whether Petitioner is entitled to a hearing on the claims raised in the subsequent petition and to be entitled to such a hearing, a habeas corpus petitioner must establish that the grounds were either constitutionally non-waivable or could not reasonably have been raised in the earlier petition. Smith v. Zant, supra at 647.

Utilizing the tests set forth in Dix v. Zant, supra and Smith v. Zant, supra, the Superior Court of Butts County found that an objection to the composition of a grand or petit jury is not a non-waivable claim. The Superior Court of Butts County noted that no jury challenge was raised on behalf of the Petitioner prior to trial and that on direct appeal to the Supreme Court of Georgia, Petitioner's challenge to the composition of the grand and petit juries was found to be untimely. Amadeo v. State, 243 Ga. 627, 629, 256 Ga. 810 (1979). The state habeas corpus court went on to note that Petitioner did not raise the jury composition issue, on its merits, in the initial state habeas corpus petition which he filed nor did he raise an ineffective assistance of counsel claim based on the failure to challenge the jury compositions. The Superior Court of Butts County concluded that this claim had been waived.

The state habeas corpus court, citing Dix v. Zant, supra, noted that Petitioner was represented by the same counsel in his successive state habeas corpus proceeding as he was being represented by in the subsequent petition. The state habeas corpus court concluded, "he has made no showing that his claim as to ineffectiveness for failure to challenge the jury composition could not have been raised in his first petition." (Appendix B).

Having found that the Petitioner had not established as a matter of state law that this allegation of alleged ineffective assistance of counsel should be heard on its merits, the state habeas corpus court properly found the petition to be successive and granted Respondent's motion to dismiss.

The Supreme Court of Georgia denied Petitioner's application for a certificate of probable cause to appeal.

Respondent submits that Petitioner has not asserted that any federal ground was used as a basis for the decision of either the state habeas corpus court or the Supreme Court of Georgia. Petitioner has thus failed to carry his burden of establishing that a federal question was properly presented and that a disposition of that question was necessary to the lower court's decision. Durley v. Mayo, 351 U.S. 277, 281 (1956); Stembridge v. Georgia, 343 U.S. 541, 547 (1952).

Instead, Petitioner has attempted to argue the claim of ineffective assistance of counsel before this Court on its merits, rather than address the fact that the state courts applied the state waiver rule to this claim raised for the first time in a successive state habeas corpus petition. Although Petitioner maintains that he has not waived his right to present this claim under the terms and provisions of O.C.G.A. § 9-14-51, Respondent submits that whether or not there has been a waiver under state law presents no federal question for this Court's review.

This Court has declined to review state court judgments based on adequate and independent state grounds, as long as there is no discrimination merely because a federal question is involved. Henry v. Mississippi, 379 U.S. 443 (1965); Herb v. Pitcairn, 324 U.S. 117, 118 (1945). Procedural defects in state proceedings may serve as a sufficient state ground, if the state's insistence on compliance with the rules serves a legitimate state interest. Henry v. Mississippi, 379 U.S. at 448.

The Georgia procedural rule requiring that all claims which are non-waivable and which reasonably can be raised, be alleged in an initial state habeas corpus petition serves a legitimate state interest. This encourages the litigation of claims in one proceeding when they are ripe for review and avoids piecemeal litigation whose purpose or effect is to harass or delay the courts and to prevent the imposition of the judgment and sentence already entered by the state courts.

Any grounds which are constitutionally non-waivable are expressly excepted under the Georgia statutory provision or any grounds which could not reasonably have been raised are also a statutory exception to the waiver provision under state law.

Even now, Petitioner has not asserted why he could not have raised the claim of ineffective assistance of counsel for failure to challenge the grand and petit juries at the time that he filed his first state habeas corpus petition, but rather requests that this Court review the claim because this is a death penalty case.

Respondent submits that because the state habeas corpus court properly declined to review the allegation of alleged ineffective assistance of counsel raised for the first time in a successive state habeas corpus petition, as the claim had been

waived under state law, the ruling of the state habeas corpus court, as affirmed by the Supreme Court of Georgia was based on an adequate and independent state ground. Therefore, Respondent submits that this Court should decline to review Petitioner's case.

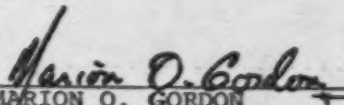
CONCLUSION

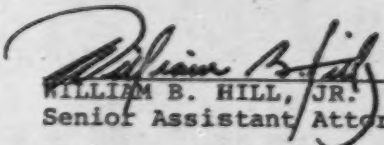
For all of the above and foregoing reasons, Respondent respectfully requests this Court to deny the petition for a writ of certiorari filed on behalf of Tony B. Amadeo.

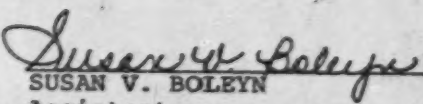
Respectfully submitted,

MICHAEL J. BOWERS
Attorney General

JAMES P. GOOGE, JR.
Executive Assistant
Attorney General


MARION O. GORDON
First Assistant Attorney General


WILLIAM B. HILL, JR.
Senior Assistant Attorney General


SUSAN V. BOLEYN
Assistant
Attorney General

Please serve:

SUSAN V. BOLEYN
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3397

CERTIFICATE OF SERVICE

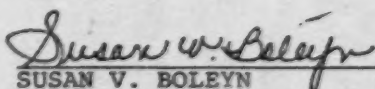
I, Susan V. Boleyn, Attorney of Record for the Respondent, and a member of the Bar of the Supreme Court of the United States, certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief for Respondent in Opposition upon Petitioner's attorney by depositing a copy of same in the United States mail, with proper address and adequate postage to:

Mr. John R. Martin
Martin and Young
504 Grand Building
44 Broad Street, N.W.
Atlanta, Georgia 30303

Mr. William M. Warner
504 The Grant Building
44 Broad Street, N.W.
Atlanta, Georgia 30303

Mr. Joseph Briley
District Attorney
Ocmulgee Judicial Circuit
P. O. Box 361
Gray, Georgia 31032

This 4th day of October, 1983.



SUSAN V. BOLEYN
Assistant Attorney General

IN THE SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

TONY B. AMADEO,

PETITIONER

VS.

ROBERT O. FRANCIS,
WARDEN, GEORGIA
DIAGNOSTIC AND
CLASSIFICATION CENTER,

RESPONDENT

HABEAS CORPUS
FILE NO. 5742

O R D E R

This habeas corpus petition, Petitioner's second petition in state courts, challenges the constitutionality of Petitioner's restraint and the imposition of the death penalty by the Superior Court of Putnam County. He was convicted of murder and criminal attempt to commit theft in Putnam Superior Court. He was sentenced to death for the murder and to ten years imprisonment for the criminal attempt conviction. The Supreme Court affirmed his convictions and sentences on direct appeal. Amadeo v. State, 243 Ga. 627 (1979). Certiorari was denied by the Supreme Court of the United States

Petitioner subsequently filed a petition for writ of habeas corpus in the Superior Court of Putnam County which was denied on February 29, 1980. His application for certificate of probable cause was denied by the Supreme Court on September 10, 1980. A motion for rehearing was denied on September 24, 1980. Certiorari was denied by

the Supreme Court of the United States.

Petitioner then filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Georgia. The petition was dismissed without prejudice on September 22, 1982, for failure to exhaust state claims. Petitioner was given the choice of returning to state courts to exhaust his ineffective assistance claim or amending his petition in federal court to pursue only exhausted claims.

Petitioner filed this petition which contains one claim for relief. He alleges that he was denied effective assistance of counsel by the failure of his trial attorney to challenge the composition of the grand and petit juries prior to his trial.

Respondent filed a motion to dismiss on the ground that the petition is successive.

THE ISSUE OF SUCCESSION

OCCA §9-14-51 (Code Ann. §50-127(10)) provides,

"All grounds for relief claimed by a petitioner for a writ of habeas corpus shall be raised by a petitioner in his original or amended petition. Any grounds not so raised are waived unless the Constitution of the United States or of this state otherwise requires or unless any judge to whom the petition is assigned, on considering a subsequent petition, finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition."

In considering this Code section in Dix v. Zant, 249 Ga. 810 (1982), the Court stated that a subsequent habeas petition

effects a waiver on any grounds not originally raised, subject to two exceptions. The first exception is where the state or federal Constitution provides otherwise. The second exception is where the presiding judge finds other grounds in the subsequent petition which could not have reasonably been raised in the original or amended petition.

In considering a successive petition, the habeas court must determine as a threshold matter whether a petitioner is entitled to a hearing on his belated claims. Smith v. Zant, No. 39172 (Ga. March 1, 1983). To be so entitled, a petitioner must raise grounds which are either constitutionally nonwaivable or which could not reasonably have been raised in the earlier petition. Id.

Amadeo's claim that he received ineffective assistance of counsel for failure to challenge the grand and petit jury composition fails to meet either test.

An objection to the composition of a grand or petit jury is not a nonwaivable claim. Smith v. Zant, *supra*. Amadeo raised no grand or petit jury challenge prior to his trial. On direct appeal his challenge to jury composition was found to be untimely. Amadeo v. State, *supra* at 629(4). He did not pursue the jury composition issue in his first habeas corpus petition or raise an ineffective assistance claim relating thereto. Thus, the Court concludes this claim has been waived.

As to the second test, Petitioner, as in Dix v. Zant, *supra*, was represented in his first habeas corpus action by the same counsel as he is here. He has made no showing that his claim as to ineffectiveness for failure to challenge

jury composition could not have been raised in his first petition.

Petitioner attempts to distinguish Dix on the ground that Dix involved an ineffectiveness claim while Petitioner's claim goes to the "very vital issue" of jury composition. As noted above, a challenge to jury composition can be waived. Petitioner's argument is found to be without merit.

Accordingly, the Court concludes that the petition is successive. The motion to dismiss is hereby granted.

SO ORDERED, this 16th day of March, 1983.

Hal Craig
HAL CRAIG
JUDGE, SUPERIOR COURTS
FLINT JUDICIAL CIRCUIT

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

TONY B. AMADEO,

Petitioner,

vs.

WALTER D. ZANT, Warden,
Georgia Diagnostic and
Classification Center,

Respondent.

CIVIL ACTION NO. 81-122-MAC

FILED

at 12:10 P.M. 9/22/82

SEP 22 1982

Deputy Clerk, U.S. District Court
MIDDLE DISTRICT OF GEORGIA

OWENS, District Judge:

Following his conviction for murder and the imposition of the death penalty petitioner Tony B. Amadeo unsuccessfully appealed to the Supreme Court of Georgia, 243 Ga. 627, ____ S.E.2d ____ (1979); applied for a writ of certiorari to the Supreme Court of the United States; petitioned the Superior Court of Putnam County for a writ of habeas corpus; attempted to appeal to the Supreme Court of Georgia; and applied for a writ of certiorari to the Supreme Court of the United States. All were denied.

On June 8, 1981, petitioner pursuant to 28 U.S.C. § 2241, et seq., filed his petition for a writ of habeas corpus in this court and by amendment of July 27, 1981, alleged that he was denied the effective assistance of counsel guaranteed to him by the Sixth and Fourteenth Amendments to the United States Constitution on account of "the failure of the Petitioner's trial counsel to challenge the grand and petit jury composition prior to the trial of the Petitioner in Putnam County, Georgia on these charges."

28 U.S.C. § 2254 provides:

"(a) . . . a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

"(b) An application for a writ of habeas corpus

the applicant has exhausted the remedies available in the courts of the State

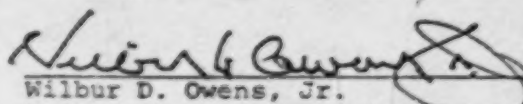
"(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

While this petitioner has previously asserted to the courts of this State upon appeal and by state habeas petition that the grand and petit jury lists were unconstitutionally composed, the petitioner has not claimed in any state court proceeding the denial of the effective assistance of counsel guaranteed to him by the Sixth and Fourteenth Amendments to the Constitution of the United States. See Goodwin v. Balkcom, ____ F.2d ____ (11th Cir., Sept. 3, 1982).

Section 2254(a), (b) and (c), 28 U.S.C., require exhaustion of all remedies available in the courts of this State as a condition precedent to proceeding in this United States District Court. The concept of § 2254 is that the courts of this State should have the first opportunity to consider claims of state prisoners that their rights under the Constitution of the United States were violated, should hold necessary full and fair evidentiary hearings, and should make "a determination on the merits of a factual issue" § 2254(d). Only when state courts have been presented with constitutional claims and had the opportunity to hold an evidentiary hearing and make such determination on each and every constitutional claim, can a state prisoner get his constitutional claims considered in this court.

When a state prisoner includes constitutional claims that have been presented to a state court -- exhausted claims -- and constitutional claims that have not been presented to a state court -- unexhausted claims -- in his habeas petition to a United States District Court, the district court is required to dismiss his petition "leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court." Rose v. Lundy, ____ U.S. ____, 71 L.Ed.2d 379,

Accordingly, petitioner's petition, as amended, is DISMISSED
without prejudice this 22nd day of September, 1982.



Wilbur D. Owens, Jr.
United States District Judge

Smith
Haw

Return to WDO-

GOODWIN v. BALKCOM

2570

Terry Lee GOODWIN, Petitioner,

v.

Charles BALKCOM, Warden,
Respondent.

No. 81-7132.

United States Court of Appeals,
Eleventh Circuit.

Sept. 3, 1982.

State prisoner under death sentence was denied relief in habeas corpus by the United States District Court for the Middle District of Georgia, at Athens, Wilbur D. Owens, Jr., Chief Judge, 501 F.Supp. 317. Prisoner appealed. The Court of Appeals, Hatchett, Circuit Judge, held that where trial counsel's ineffective assistance evidenced by his lack of thorough investigation deprived defendant of potential defense and, additionally, decision to raise what would have been credible challenge to composition of grand jury was unperceived, prisoner was entitled to relief in habeas corpus.

Death sentence set aside, and judgment reversed and remanded.

1. Habeas Corpus ⇐92(1)

In habeas corpus proceeding in federal court, prisoner's contentions as to instructions to jury would be reviewed in light of standard by which state court jury instructions are judged in federal habeas corpus proceedings, and jury charge was to be examined as a whole to determine adequacy of instructions. 28 U.S.C.A. § 2254.

2. Constitutional Law ⇐268(11)
Criminal Law ⇐1213

Capital sentencing instructions which do not clearly guide jury in its understanding of mitigating circumstances and their purpose, and of option to recommend life sentence although aggravating circumstances are found, violate Eighth and Fourteenth Amendments. U.S.C.A. Const. Amends. 8, 14; Ga. Code, § 27-2534.1(b).

3. Homicide ⇐311

In capital case in state court, even if instruction given to jury prior to receipt of any evidence in sentencing phase could be considered as part of capital sentencing charge, it was deficient in merely telling jury that they would hear additional evidence in extenuation, mitigation or aggravation of punishment, and instruction was clearly erroneous also by reason of failure to inform jury about option to impose life imprisonment even though aggravating circumstances were found. U.S.C.A. Const. Amends. 5, 6, 8, 14; 28 U.S.C.A. § 2254; Ga. Code §§ 27-2534.1(b), 27-2537.

4. Criminal Law ⇐770(2)

Arguments of counsel can never substitute for instructions given by the court, and argument cannot perfect otherwise faulty jury charge.

5. Criminal Law ⇐735

Whether defendant has been denied effective assistance of counsel is mixed question of fact and law, and clearly erroneous rule does not apply to such questions. U.S. C.A. Const. Amend. 6.

6. Habeas Corpus ⇐85.1(2)

State habeas corpus court's resolution of question whether defendant was denied effective assistance of counsel is not entitled to presumption of correctness, and fed-

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eral court is not bound by state court's finding that trial counsel rendered effective assistance. U.S.C.A. Const. Amend. 6; 28 U.S.C.A. § 2254.

7. Habeas Corpus ⇐90

Where state habeas corpus court entered factual findings after full and fair consideration of issue in state habeas corpus proceeding, there was no need for evidentiary hearing in federal district court. 28 U.S.C.A. § 2254.

8. Habeas Corpus ⇐98

Though federal court accepted historical findings made by state court concerning what defendant's trial counsel did to prepare for trial, federal court would exercise its own judgment to decide whether actions taken in preparation and investigation of defense were so minimal as to constitute ineffective assistance. 28 U.S.C.A. § 2254(d).

9. Constitutional Law ⇐268.1(6)

Sixth Amendment, through Fourteenth, entitles state criminal defendant to right to counsel reasonably likely to render and rendering reasonably effective assistance. U.S.C.A. Const. Amends. 6, 14.

10. Criminal Law ⇐641.13(1)

Effective assistance of counsel does not mean errorless assistance, nor counsel judged ineffective by hindsight, but, rather, inquiry as to actual performance of counsel conducting defense, and determination whether reasonably effective assistance was rendered is based upon totality of circumstances and entire record, and, in applying such standard, no distinction is to be drawn between retained and appointed counsel. U.S.C.A. Const. Amends. 6, 14.

11. Criminal Law ⇐641.13(1)

The "totality of circumstances" from which it is determined whether defendant received reasonably effective assistance of counsel encompasses quality of counsel's assistance from time of appointment or retention through appeal, and at heart of effective representation is independent duty to investigate and prepare.

12. Habeas Corpus ⇐25.1(6)

Assistance rendered to defendant may be deemed ineffective although proceedings were not farce or mockery, but federal habeas corpus relief is proper only where showing of prejudice accompanies initial and distinct determination of ineffective assistance, and same is true even in those cases where counsel's preparation and investigation have been adjudged woefully inadequate. U.S.C.A. Const. Amend. 6.

13. Criminal Law ⇐641.13(2)

Fears of negative public reaction to thought of representing unpopular defendant hamper every facet of counsel's functions, and his reminding jury that undertaking is not by choice, but in service to public, is objectionable as effectively stacking odds against accused.

14. Criminal Law ⇐641.13(2)

Although sentiments expressed by defendant's trial counsel would be deplored, court could not overemphasize that culpability of counsel was not the issue, but, rather, court's concern centered on Sixth Amendment right of defendant. U.S.C.A. Const. Amend. 6.

15. Habeas Corpus ⇐25.1(6)

Record of capital case indicated that prima facie case of discrimination in grand jury selection, violative of equal protection

clause of Fourteenth Amendment, could have been established and that, in absence of showing of no discriminatory intent by state, relief would have been granted had there been effective assistance of counsel. Ga. Code, § 50-127(1); 28 U.S.C.A. § 2254; U.S.C.A. Const. Amends. 6, 13.

16. Habeas Corpus ⇐25.1(6)

Where defendant waived right to challenge composition of grand and petit juries under state law, and state had not had opportunity to rebut defendant's apparently prima facie case of discrimination in composition of grand or petit jury federal court in habeas corpus would not grant substantive relief on such claim as such, but merits could be addressed within framework of Sixth Amendment allegation as representing example of trial counsel's ineffective assistance. Ga. Code, § 50-127(1); 28 U.S.C.A. § 2254; U.S.C.A. Const. Amend. 6.

17. Jury ⇐108

Law demands strict adherence to requirements of *Witherspoon*, which teaches that, unless venireman states unambiguously that he would automatically vote against imposition of capital punishment no matter what trial might reveal, it simply cannot be assumed that that is his position, and raising of hand fails to satisfy requirement of unambiguous statement. Ga. Code, § 50-127(1).

18. Criminal Law ⇐641.13(2)

On record, defendant's two trial attorneys did not provide reasonably effective assistance of counsel throughout all phases of his trial. Ga. Code, §§ 27-2503(a, b), 27-2534.1(b); 28 U.S.C.A. § 2254; U.S.C.A. Const. Amend. 6.

19. Habeas Corpus ⇐25.1(6)

To obtain habeas corpus relief, on ground of ineffective assistance of counsel, some degree of prejudice must be shown. 28 U.S.C.A. § 2254; U.S.C.A. Const. Amend. 6.

20. Arrest ⇐63.4(7)

Deputy's information concerning assertions by unidentified girl claiming to have overheard defendant make incriminating statements was not enough to establish probable cause to arrest. U.S.C.A. Const. Amend. 4.

21. Criminal Law ⇐641.13(6)

Court could not state with sufficient degree of assurance that confession would have been suppressed had counsel realized law provided avenue for such measure, but where possibility of suppression existed, it could not be said that trial counsel's ineffective preparation and investigation was harmless beyond reasonable doubt. 28 U.S.C.A. § 2254; U.S.C.A. Const. Amend. 6.

22. Habeas Corpus ⇐25.1(6)

Where trial counsel's ineffective assistance evidenced by his lack of thorough investigation deprived defendant of potential defense and, additionally, decision to raise what would have been credible challenge to composition of grand jury was unperceived, defendant, state prisoner, was entitled to relief in habeas corpus. 28 U.S.C.A. § 2254; U.S.C.A. Const. Amend. 6.

Appeal from the United States District Court for the Middle District of Georgia.

Before INGRAHAM*, HATCHETT and ANDERSON, Circuit Judges.

HATCHETT, Circuit Judge:

Terry Lee Goodwin appeals the district court's denial of his habeas corpus petition challenging his state convictions for murder and armed robbery. The petition alleges, in addition to other things, that Goodwin was denied effective assistance of counsel at his state trial in violation of the sixth amendment, and that the state trial court's capital sentencing instructions were constitutionally inadequate. Agreeing with Goodwin on these allegations, we reverse and remand.

I. FACTS

On Wednesday evening, April 9, 1975, eighteen-year-old Terry Lee Goodwin and seventeen-year-old Brad Studdard played pool at the Snack and Rack Recreation Parlor in Monroe, Georgia. After leaving the poolroom in Studdard's car about 10:30 p. m., the youths drove to a convenience store to purchase beer. As they drove into the country, they talked, drank beer, and smoked marijuana. Finishing the beer, Studdard parked the car along a dirt road to urinate. Goodwin exited the vehicle, pulled a butcher knife from his pocket, and demanded that Studdard give him the car. When Studdard refused, Goodwin marched Studdard into the woods nearby and repeated his demand. Studdard again refused and attempted to flee but tripped and fell to the ground. Goodwin pursued Studdard and stabbed him approximately eighteen times. Goodwin left Studdard in the woods where he died from loss of blood.

Goodwin drove the car back to town and abandoned it near his residence. Sheriff's

deputies discovered the car on Thursday afternoon. On Friday, Goodwin phoned the Studdard residence to inquire about Brad's disappearance. Although he did not identify himself, Goodwin claimed to be a friend of Brad's and asked if a reward was being offered. The victim's sister told Goodwin that money could be raised for information concerning her brother's whereabouts. Goodwin phoned again later and, claiming to be "John Smith," told Brad's sister he had heard something about Good Hope Road (a road near the dirt road where the killing occurred). A local radio station received several calls that same day from Goodwin, again identifying himself as John Smith, asking about a reward, and advising the search party to look near Good Hope Road. At approximately 12:30 a. m. on Saturday, sheriff's deputies, acting on a tip from an unidentified woman who purportedly overheard Goodwin admit to the killing, went to Goodwin's house. Goodwin's mother came to the door and the deputies told her they wanted to talk to Terry. After she let them in, one deputy went into Goodwin's bedroom and, awakening him, told him "to get up and get your clothes on," and to accompany them to the station for questioning. He complied.

Upon being advised of his constitutional rights, Goodwin told the deputies that a friend had told him to look for Studdard's body near the same dirt road where Goodwin and Studdard had stopped on Wednesday evening. On Saturday afternoon, Goodwin accompanied deputies to this location, and the deputies discovered the body. That same afternoon, deputies secured a search warrant for Goodwin's house and upon executing it, found a bloodstained coat containing items belonging to Studdard.

* Honorable Joe M. Ingraham, U. S. Circuit Judge

for the Fifth Circuit, sitting by designation.

The deputies found the keys to the victim's car under a rug. When confronted with this physical evidence on Saturday evening, Goodwin confessed to the killing. The next morning (Sunday), deputies returned to the scene of the crime and found the butcher knife across the road from where Studard's body had been located.

The Walton County, Georgia, grand jury indicted Goodwin on charges of murder and armed robbery. Because he was indigent, the court appointed him counsel. At trial in the Walton County Superior Court, the defense presented evidence to show that Goodwin's reduced mental capacity made it impossible for him to knowingly waive his fifth amendment rights prior to confessing to the crimes.¹ The trial court rejected this approach, and Goodwin was convicted of the offenses and sentenced to death. On appeal and mandatory death sentence review, the Supreme Court of Georgia affirmed his conviction and sentence.² *Goodwin v. State*, 236 Ga. 339, 223 S.E.2d 703 (1976), cert. denied, 432 U.S. 911, 97 S.Ct. 2961, 53 L.Ed.2d 1085 (1977).

Represented by different counsel, Goodwin filed an extraordinary motion for new trial in Walton County Superior Court. The Georgia Supreme Court affirmed the denial of this motion. *Goodwin v. State*,

240 Ga. 605, 242 S.E.2d 119 (1978). Goodwin then petitioned the Superior Court of Tattnall County for a writ of habeas corpus alleging that errors of constitutional magnitude rendered his trial fundamentally unfair. The court denied the petition after an evidentiary hearing, and the Georgia Supreme Court affirmed the denial. *Goodwin v. Hopper*, 243 Ga. 193, 253 S.E.2d 156 (1979).

Having exhausted all available state remedies, Goodwin sought habeas corpus relief in the United States District Court for the Middle District of Georgia under 28 U.S.C.A. § 2254 (1976). The district court 501 F.Supp. 317 ordered Goodwin's execution stayed pending resolution of the habeas corpus action. The court referred the petition to a magistrate who, without holding an evidentiary hearing, submitted proposed findings of fact and conclusions of law to the district court. Believing the jury instructions regarding the imposition of the death penalty were constitutionally infirm, the magistrate recommended that Goodwin's death sentence be vacated, but in all other respects, Goodwin's conviction should stand.³ Both parties filed objections to the magistrate's recommendations. The district court adopted the majority of the mag-

1. Eleven days after Goodwin confessed to the crimes, the Walton County Superior Court ordered Goodwin confined to the Central State Hospital at Milledgeville, Georgia, for a psychiatric evaluation. Goodwin remained at the hospital approximately three months. An examining psychiatrist testified that Goodwin's I.Q. was eighty-one and diagnosed him to be "borderline mental retardation." He classified Goodwin's mental age at approximately fourteen years. A school psychologist who examined Goodwin a few days before trial testified that, in her opinion, Goodwin's mental age was nine years six months. Her examination placed Goodwin's I.Q. at fifty-eight.

2. Georgia's capital sentencing procedure requires all death sentences be reviewed by the Georgia Supreme Court. Ga.Code Ann. § 27-2537.

3. The magistrate was not the first to attack the infirmities of the trial court's sentencing charge. In the appeal of his state habeas corpus petition to the Georgia Supreme Court, Justices Hill and Marshall, troubled by the lack of instruction on the option to recommend life imprisonment, dissented "in the belief that [Goodwin] should be given a retrial as to sentencing." *Goodwin v. Hopper*, 243 Ga. 193, 197, 253 S.E.2d 156, 159 (1979) (Hill, J., dissenting).

istrate's recommendations, but reached a different conclusion on the jury instructions issue and denied habeas corpus relief. This appeal followed.

II. ISSUES ON APPEAL

On appeal, Goodwin urges us to consider a number of issues which, either standing alone or in conjunction with his predominate claim of ineffective assistance of counsel, require the vacating of his conviction and death sentence. Goodwin contends (1) that he was illegally arrested; (2) that his confession was not the product of a knowing and intelligent waiver of his fifth amendment rights; (3) that four veniremen were improperly excluded in violation of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968); (4) that he was denied effective assistance of counsel at his state trial; (5) that the state trial court's jury instructions shifted the burden of proof to Goodwin and failed to define "capital felony" thus depriving him of a jury adequately guided in its deliberation; (6) that the state trial court's capital sentencing instructions were unconstitutional because they failed to instruct on the consideration of mitigating circumstances and the option to recommend against death; (7) that his federal habeas corpus petition was improperly denied without the benefit of an evidentiary hearing because the state habeas corpus proceeding did not adequately develop the factual issues in a full and fair hearing; and (8) that the death penalty violates the eighth amendment because it is administered in an irregular and capricious fashion. Addressing only those contentions we deem dispositive of the case, we must decide whether the trial court's capital sentencing instructions were constitutionally insufficient and whether Goodwin was denied effective assistance of counsel in viola-

tion of the sixth amendment. Our resolution of these two issues makes discussion of the other issues unnecessary.

III. CAPITAL SENTENCING INSTRUCTIONS

In the sentencing phase of Goodwin's trial subsequent to the jury's verdict of guilty on the murder and armed robbery charges, the trial court allowed presentation of evidence of aggravating and mitigating circumstances. The state presented documentary evidence of Goodwin's 1974 forgery convictions. Goodwin presented no evidence at this phase of the case. Following jury arguments by counsel for both sides, the trial court instructed the jury:

Ladies and Gentlemen of the Jury, you having found the defendant guilty of the offense of murder and armed robbery, it is now your duty to determine within the limits prescribed by law, the penalty that shall be imposed as punishment for that offense.

In reaching this determination, you are authorized to consider all of the evidence received by you in open court in both phases of this trial. You are authorized to consider all of the facts and circumstances of the case.

Under the laws of this state, every person guilty of the offense of murder or armed robbery shall be punished by life in the penitentiary or death by electrocution. And under the laws of this state, every person guilty of the offense of armed robbery shall be punished by life in the penitentiary or death by electrocution or by from one to twenty years in prison.

In the event that your verdict is life in prison, the punishment the defendant would receive would be imprisonment in

the penitentiary for and during the remainder of his natural life. If that be your verdict, you would add to the verdict already found by you, an additional verdict as follows: "And we fix his punishment as life imprisonment."

If you decide—excuse me, let me begin again. [If you should decide to sentence the defendant for the offense of armed robbery, then the form of your verdict would be, "We, the Jury, sentence the defendant to 'blank' years," and where the court has used the term 'blank', you would insert the term of years to which you sentence this defendant for the offense of armed robbery.

You may, however, if you see fit and if that be your verdict, fix his punishment as death for murder, which would require a sentence by the court of death by electrocution.

I charge you that before you would be authorized to find a verdict fixing a sentence of death by electrocution, you must find evidence of statutory aggravating circumstances as I will define to you later in the charge, sufficient to authorize the supreme penalty of the law.

I charge you that a finding of statutory aggravating circumstances or circumstances [sic] shall only be based upon evidence convincing your minds beyond a reasonable doubt as to the existence of one or more of the following factual conditions in connection with the defendant's perpetration of the act for which you have found him guilty. They are: Number one, the offense of murder was committed while the offender was engaged in the commission of another capital felony.

Two, the offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

The statutory instructions that you are authorized to consider will be submitted in writing to you, the Jury, for your deliberations. If your verdict should be a recommendation of death, you would add to the verdict already found by you, an additional verdict as follows: "And we fix his punishment as death." Additionally, you must designate in writing the aggravating circumstance or circumstances which you find beyond a reasonable doubt.

Your verdict should be agreed to by all twelve of your members. It must be in writing, entered upon the indictment, dated, and signed by your foreman or forelady and returned into court for publication.

Now if you fix a sentence for murder, the offense of armed robbery would merge with the offense of murder and you would not need to specify any sentence for the offense of armed robbery.

You could not set a sentence for both offenses of armed robbery and murder, but must select which offense you desire to sentence—to which you desire to sentence the defendant.

You may now retire to the Jury Room, elect one of your number as foreman or forelady, and begin your deliberations. These instructions, by law, are to be sent out by you. At the last minute, I made some changes in my own handwriting. And I do not mean to be facetious at this grave stage of this trial, but it might be that you cannot read my writing. And if so, if you will please tell the Bailiff, I will have them typed.

You may now retire to the Jury Room and begin your deliberations.

[1] Goodwin argues that this charge runs contrary to the guidelines established in *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality opinion), and *Bell v. Ohio*, 438 U.S. 637, 98 S.Ct. 2977, 57 L.Ed.2d 1010 (1978) (plurality opinion), and adhered to by this court's predecessor in *Chenault v. Stynchcombe*, 581 F.2d 444 (5th Cir. 1978). Specifically, Goodwin contends that these instructions did not adequately focus the jury's attention on the consideration of mitigating circumstances and the option of recommending a life sentence even if aggravating circumstances were found.⁴ According to Goodwin, these inadequacies violate the eighth and fourteenth amendments to the United States Constitution. We review Goodwin's contentions in light of the standard by which state court jury instructions are judged in federal habeas corpus proceedings. Singular aspects of the charge may not be viewed in isolation. *Cupp v. Naughton*, 414 U.S. 141, 146-47, 94 S.Ct. 396, 400, 38 L.Ed.2d 368

(1973). [Instead, the federal appellate court must examine the charge as a whole to determine the adequacy of the instructions. *Davis v. McAllister*, 631 F.2d 1256, 1260 (5th Cir. 1980), cert. denied, 452 U.S. 907, 101 S.Ct. 3035, 69 L.Ed.2d 409 (1981); *Stephens v. Zant*, 631 F.2d 397, 405 (5th Cir. 1980), modified on other grounds on panel rehearing, 648 F.2d 446 (5th Cir. 1981), cert. granted, — U.S. —, 102 S.Ct. 575, 72 L.Ed.2d 222 (1982) (case certified to Georgia Supreme Court).

Our resolution on the constitutionality of these instructions is significantly aided by the discussion given this topic in *Spivey v. Zant*, 661 F.2d 464 (5th Cir. 1981), cert. denied, — U.S. —, 102 S.Ct. 3495, 73 L.Ed.2d — (1982).⁵ [In *Spivey*, an almost identical charge was found deficient because it failed to guide the jury in the consideration and understanding of the nature and function of mitigating circumstances.⁶ Holding that the eighth and four-

4. Goodwin cites as mitigating circumstances his age, race, reduced mental capacity, social, economic, and family background. Evidence of these circumstances was presented during the guilt phase of trial through testimony of Goodwin's mother, a school psychologist, and the state's psychiatrists.

5. *Spivey v. Zant* is binding on this circuit as a post-September 30, 1981, decision of a Unit B panel of the Former Fifth Circuit. See *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33 (11th Cir. 1982).

6. The trial court charged the jury in *Spivey v. Zant* as follows:

Ladies and gentlemen, you have found the defendant guilty of the offense of murder. It is now your duty to determine, within the limits prescribed by law, the penalty that shall be imposed as punishment for that offense. In reaching this determination you are authorized to consider all the facts and circumstances of the case.

Under the laws of this State, every person guilty of the offense of murder, shall be pun-

ished by life in the penitentiary, or death by electrocution.

I charge you that before you would be authorized to find a verdict fixing a sentence of death by electrocution, you must find evidence of statutory aggravating circumstances, as I will define to you later in the charge, sufficient to authorize the supreme penalty of the law.

I charge you that a finding of statutory aggravating circumstance shall only be based upon evidence convincing your mind beyond a reasonable doubt as to the existence of one, or of the factual condition in connection with the defendant's perpetration of acts for which you have found him guilty. [Sic]

Now, the law provides certain aggravating circumstances which you may consider for this purpose. If the offense of murder was committed while the offender was engaged in the crime of another capital felony, in this case, the capital felony charged by the State is that of armed robbery, I have given you in charge, you have received the definition of armed robbery.

teenth amendments require clear instructions which do not preclude the consideration of mitigating circumstances, the Spivey panel explained that,

"In most cases, this will mean that the judge must clearly and explicitly instruct the jury about mitigating circumstances and the option to recommend against death; in order to do so, the judge will normally tell the jury what a mitigating circumstance is and what its function is in the jury's sentencing deliberations.

Spivey, 661 F.2d at 471 (emphasis added, footnote omitted).

The imposition of the death penalty under Georgia's current death penalty statute has been upheld by the United States Supreme Court. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (plurality opinion). In *Gregg*, the Court approved of Georgia's revised statute because although "some jury discretion still exists, the discretion to be exercised is controlled by clear and objective standards so as to produce nondiscriminatory application." *Gregg*, 428 U.S. at 198, 96 S.Ct. at 2936, quoting *Coley v. State*, 231 Ga. 829, 834, 204 S.E.2d 612, 615 (1974). The *Gregg*

plurality further noted that discretion is not fully accorded the sentencer unless it is exercisable in an informed manner. "[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg*, 428 U.S. at 189, 96 S.Ct. at 2932.

Subsequent announcements from the Supreme Court have amplified the constitutional strictures on sentencing instructions. In *Lockett v. Ohio* and *Bell v. Ohio*, a plurality held the Ohio death penalty statute unconstitutional because it precluded the sentencer from considering individualized, mitigating factors as required by the eighth and fourteenth amendments. Like the charge in *Spivey*, Goodwin's jury was never affirmatively precluded from considering any mitigating circumstances. This is not, however, the extent of our interpretation of *Lockett* and *Bell*. [The rule from those decisions requires explicit instructions on mitigation and the option to recommend against death. In *Chenault v. Stynchcombe*, the court concluded:

The statutory instructions that you are authorized to consider will be submitted in writing to you the jury for your consideration. If you fix his punishment as death, you must also designate in writing that aggravating circumstance which you find beyond a reasonable doubt.

Your verdict must be agreed to by all twelve of your members, it must be in writing, entered upon the indictment, dated and signed by your foreman, and returned into Court for publication.

You may retire and begin your deliberations, after you have received the indictment and documented evidence adduced in the presentence hearing, and then determine the penalty or punishment that shall be imposed in this case. You must first consider and find beyond a reasonable doubt that the ag-

gravating circumstance, or the murder happening while in the perpetration of another capital felony, armed robbery, armed robbery is a capital felony, you must find that beyond a reasonable doubt.

If you find that to exist, then you shall so indicate in writing, then you will determine whether or not you will impose the death penalty, and your verdict then will be one of two: "We the jury recommend the death penalty," or "We the jury do not recommend the death penalty." That is a matter for your determination, ladies and gentlemen.

You will have this in writing to carry out with you to assist you in preparation of your verdict. You may retire at this time and fix punishment in this case.

Spivey, 661 F.2d at 468.

This constitutional requirement to allow consideration of mitigating circumstances would have no importance, of course, if the sentencing jury is unaware of what it may consider in reaching its decision. [We read *Lockett and Bell*, then, to mandate that the judge clearly instruct the jury about mitigating circumstances and the option to recommend against death.

Chenault, 581 F.2d at 448.

[2] In this circuit, then, the state of the law is well settled. [Capital sentencing instructions which do not clearly guide a jury in its understanding of mitigating circumstances and their purpose, and the option to recommend a life sentence although aggravating circumstances are found, violate the eighth and fourteenth amendments.]

[3, 4] After the guilty verdict was recorded, but prior to the receipt of any evidence in the sentencing phase, the court explained to the jury what would occur at this stage of the trial. The court stated:

Now, Ladies and Gentlemen, having convicted the defendant of the offenses of murder and armed robbery, it is necessary that the court resume the trial and conduct a presentence hearing before you, the only issue to be the determination of the punishment to be imposed.

Subject to the laws of evidence, you, the Jury, shall hear additional evidence in

extenuation, mitigation or aggravation of punishment, including the record of any prior crimes, convictions or pleas of guilty or pleas of *nolo contendere* of the defendant, or the absence of any such prior crimes convictions and pleas.

You Jurors shall hear arguments by the defendant or his counsel and the prosecuting attorney as provided by law regarding the punishment to be imposed.

At the conclusion of evidence and argument, the court will give you instructions, after which, you will retire to determine the punishment to be imposed. It will be your duty to fix the sentence within the limits prescribed by law and the court will impose the sentence fixed by you in the way and in the manner you prescribe.

The state contends that the district court was correct when it found the instructions, taken as a whole, would lead a reasonable juror to fully understand the duties and options under the charge considering the statement set out above. We disagree. Even if this explanatory statement can be considered part of the capital sentencing charge—which we seriously doubt it can—it still does not meet the requirements specified in *Spivey*. The reference to "evidence in mitigation" in no way told the jury what a mitigating circumstance is, nor explained its function in the jury's deliberation process. *Spivey*, 661 F.2d at 471.

7. As did the petitioner in *Spivey*, Goodwin challenges the jury instructions given in this case, not the validity of the Georgia death penalty statute. The relevant statute provides in pertinent part that, "the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law." Ga. Code Ann. § 27-2534.1(b). As noted in *Spivey*, the trial court is not constitutionally required to use the words

"mitigating circumstances" in its capital sentencing charge. "So long as the instruction clearly communicates that the law recognizes the existence of circumstances which do not justify or excuse the offense, but which, in fairness or mercy, may be considered as extenuating or reducing the degree of moral culpability . . . the constitutional requirement is satisfied." *Spivey*, 661 F.2d at 471 n.8 (citation omitted).

The Spivey jury instructions were found lacking because adequate guidance as to the function of mitigating circumstances was not provided. That part of the Spivey charge authorizing the jury "to consider all the evidence received by you in open court, and [sic] both phases of the trial ... [and] all the facts and circumstances of the case" was held not to be the type of clear instruction that the Constitution requires. *Spivey*, 661 F.2d at 472. Goodwin's charge is similarly infected with this insufficient passage. On this ground alone, his death sentence is required to be vacated. The trial court's charge in this case, however, is doubly fatal. Nowhere does the charge even slightly hint about the option to impose life imprisonment even though aggravating circumstances are found.⁸ We agree with Justices Hill and Marshall who, in their dissent to the denial of Goodwin's state habeas corpus petition commented that "the judge did not instruct the jury in any way, even unclearly, about the option to recommend against death as required by *Lockett*." *Goodwin v.*

Hopper, 243 Ga. 193, 197-98, 253 S.E.2d 156, 160 (1979) (Hill, J., dissenting).

"Because this charge fails to adequately describe the nature and function of mitigating circumstances and lacks any discussion on the option to recommend against death, we hold the charge unconstitutional." Accordingly, Goodwin's sentence of death must be vacated.

IV. THE EFFECTIVENESS OF GOODWIN'S TRIAL COUNSEL

Goodwin claims that his sixth amendment right to assistance of counsel was denied by the ineffectiveness of his court-appointed trial counsel. To bolster this claim, he raises a plethora of allegations regarding the failings of counsel. Goodwin submits that his court-appointed attorneys (1) failed to interview crucial witnesses; (2) failed to effectively challenge the legality of Goodwin's arrest; (3) failed to challenge grand and petit jury composition; (4) failed to object to *Witherspoon* violations in the ex-

8. In holding the capital sentencing charge constitutional, the district court noted that the district attorney in his closing argument to the jury during the sentencing phase of the trial stated: "So you are going to determine whether or not Terry Lee Goodwin is to be sentenced for the offense of murder, either to life or death." What this implies, of course, is that even if the trial court's instructions did not make it perfectly clear, the district attorney certainly did. During oral argument before this panel, counsel for the state made a similar evaluation. While not specifically contending that argument of counsel suffices if it informs the jury about the mitigating circumstances, state's counsel reasoned that it's impractical for a trial court trying to ascertain if a jury is aware of the scope of its authorization to totally ignore argument of counsel, especially where counsel relies on diminished capacity, race, and economic background in his closing argument. Any suggestion that counsel's argument can perfect an otherwise faulty jury charge is total-

ly erroneous. Arguments of counsel can never substitute for the instructions given by the court. *Taylor v. Kentucky*, 436 U.S. 478, 488-89, 98 S.Ct. 1930, 1936, 56 L.Ed.2d 468 (1978).

9. Since ruling on this issue in Goodwin's state habeas corpus petition, the Georgia Supreme Court has apparently taken a different position on the constitutionality of a sentencing charge identical to Goodwin's insofar as the option to recommend against death is unclear. In *Zant v. Gaddis*, 247 Ga. 717, 279 S.E.2d 219 (1981), the court affirmed the granting of habeas corpus relief as to sentence where the charge failed to adequately inform the jury of its option. "[T]he trial court's charge failed to ... inform the reasonable juror that he could recommend life imprisonment even if he should find the presence of one or more of the statutory aggravating circumstances. Nowhere in the charge is this option made clear to the jury." *Zant*, 247 Ga. at 720, 279 S.E.2d at 222 (emphasis added).

clusion of certain veniremen; (5) failed to request an instruction on mitigation of circumstances at the sentencing phase and failed to object to the trial court's failure to give such an instruction charge as required by Ga.Code Ann. § 27-2534.1(b); (6) failed to object to the admission of the records of prior convictions introduced during the sentencing phase of his trial where the state had failed to give notice as required by Ga.Code Ann. § 27-2503; (7) failed to request an instruction regarding Goodwin's diminished mental capacity, and (8) failed to object to the victim's family being seated inside the bar of the court. Goodwin suggests that these failings were generated by counsels' overall attitude concerning their representation of an unpopular client.¹⁰

In response, the state insists that considering the formidable task in representing a defendant accused of brutally stabbing his victim, Goodwin's appointed counsel rendered reasonably effective assistance. The state cites the interviewing of Goodwin, his mother, and various state witnesses, the availability of the district attorney's files, visiting the scene of the crime, attempts to plea bargain, the filing of pre-trial motions to quash the indictment and suppress the confession, and the pursuit of a defensive theory that Goodwin was too mentally incapacitated to give a knowing and voluntary confession as examples of the effectiveness of Goodwin's trial counsel.

16. Counsel originally appointed to defend Goodwin was a relative of the victim. This prompted his disqualification. The Walton County Superior Court then appointed Goodwin's trial counsel and co-counsel who represented him at trial and on appeal to the Georgia Supreme Court.

11. In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc), this court adopted as

[5-7] We address these contentions in the light of this circuit's legal standard for reviewing ineffective assistance of counsel claims, noting initially that whether a defendant has been denied effective assistance of counsel is a mixed question of fact and law.¹¹ *Cuyler v. Sullivan*, 446 U.S. 335, 341-42, 100 S.Ct. 1708, 1714, 64 L.Ed.2d 333 (1980); *Washington v. Watkins*, 655 F.2d 1346, 1354 (5th Cir. 1981). The clearly erroneous rule does not apply to such questions. *Baker v. Metcalfe*, 633 F.2d 1198, 1201 (5th Cir.), cert. denied, 451 U.S. 974, 101 S.Ct. 2055, 68 L.Ed.2d 354 (1981). Consequently, a state habeas corpus court's resolution of this question is not entitled to a presumption of correctness under 28 U.S.C.A. § 2254(d) (1976). *Harris v. Oliver*, 645 F.2d 327, 330 n.3 (5th Cir. 1981). Therefore, we are not bound by the state court's finding that Goodwin's trial counsel rendered effective assistance. We have no real disagreement, however, with the state habeas corpus court's factual findings on historical matters, that is, findings concerning what counsel actually did in preparation for trial. Here, the state habeas corpus court entered such findings after full and fair consideration of the issue in the state habeas corpus proceeding.¹² This eliminated the need for an evidentiary hearing in the district court. *West v. Louisiana*, 478 F.2d 1026, 1031-32 (5th Cir. 1973), panel opinion *aff'd and adhered to in relevant part*, 510 F.2d 363 (5th Cir. 1975) (en banc). As stated in *West*:

Where state factfinding procedures are adequate, comity and judicial economy

binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

12. We explicitly refrain from any intimation as to the fullness or fairness of the consideration given to other issues raised by Goodwin in his state habeas corpus petition.

dictate that the federal courts should not hold separate evidentiary hearings. To hold a federal hearing is to call state factfinding procedures into question. But comity does not govern the application by federal courts of their independent judgment as to federal law. That is their obligation in all cases. . . .

West, 478 F.2d at 1032.

[8] As to the historical, or primary factual findings made by the state court, section 2254(d)'s presumption of correctness is appropriate in a federal habeas corpus proceeding. *Mason v. Balkcom*, 531 F.2d 717, 722 (5th Cir. 1976). Accordingly, we accept the historical findings made by the state court concerning what Goodwin's trial counsel did to prepare for his trial. This acceptance, however, does not limit our examination of the state habeas corpus transcript for its revelations of trial counsel's inactions and the reasons therefor. [We apply our own judgment to decide whether the actions taken in preparation and investigation of Goodwin's defense were "so minimal as to constitute ineffective assistance." *Baty v. Balkcom*, 661 F.2d 391, 394 n.7 (5th Cir. 1981).

A. Standard for Effective Assistance of Counsel

[9, 10] The oft-cited constitutional standard by which counsel's assistance is evaluated is well established. The sixth amendment, through the fourteenth, entitles a state criminal defendant the right to counsel reasonably likely to render and rendering reasonably effective assistance. See, e.g., *Baty v. Balkcom*, 661 F.2d 391 (5th Cir. 1981); *Nelson v. Estelle*, 642 F.2d 903 (5th Cir. 1981); *Herring v. Estelle*, 491 F.2d 125 (5th Cir. 1974). [Effective assistance does not mean errorless assistance, nor counsel judged ineffective by hindsight. See, e.g.,

United States v. Burroughs, 650 F.2d 595 (5th Cir. 1981); *Clark v. Blackburn*, 619 F.2d 431 (5th Cir. 1980); *Easter v. Estelle*, 609 F.2d 756 (5th Cir. 1980). "Rather, the methodology for applying the standard involves an inquiry into the actual performance of counsel conducting the defense and a determination of whether reasonably effective assistance was rendered based upon the totality of circumstances and the entire record." *Nelson*, 642 F.2d at 906 (emphasis in original). See also, *United States v. Gibbs*, 662 F.2d 728 (11th Cir. 1981) (determination must come from entire record rather than specific actions). [In applying this standard, no distinction is to be drawn between retained and appointed counsel. *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).

[11] Every case involving a constitutional claim of ineffective assistance of counsel turns on the facts and the conduct of those involved. *King v. Beto*, 429 F.2d 221, 222 n.1 (5th Cir. 1970). [While counsel's performance need not be errorless, it must "fall within the range of competency generally demanded of attorneys in criminal cases." *Mylar v. State*, 671 F.2d 1299, 1301 (11th Cir. 1982). See also, *Beckham v. Wainwright*, 639 F.2d 262, 267 (5th Cir. 1981). The determination of whether the assistance rendered by counsel is reasonably effective, however, is not to be based solely upon his performance at trial. Consideration of the "totality of circumstances" encompasses the quality of counsel's assistance from time of appointment or retention through appeal. At the heart of effective representation is the independent duty to investigate and prepare. "[C]ounsel have a duty to interview potential witnesses and 'make an independent examination of the facts, circumstances, pleadings, and laws involved.'" *Rummel v. Estelle*, 590 F.2d 103, 104 (5th Cir. 1979), quoting *Von Moltke v.*

Gillies, 332 U.S. 708, 721, 68 S.Ct. 316, 322, 92 L.Ed. 309 (1948). [Thus, "[a]n attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense." *Davis v. Alabama*, 596 F.2d 1214, 1217 (5th Cir. 1979), vacated as moot, 446 U.S. 903, 100 S.Ct. 1827, 64 L.Ed.2d 256 (1980).] [T]he cornerstones of effective assistance of counsel are the "[i]nformed evaluation of potential defenses to criminal charges and meaningful discussion with one's client of the realities of his case." *Gaines v. Hopper*, 575 F.2d 1147, 1149-50 (5th Cir. 1978).

[12] The assistance rendered may be deemed ineffective although the proceedings were not a farce or a mockery. *Herring*, 491 F.2d 125, 128 (5th Cir. 1974). Nevertheless, federal habeas corpus relief is proper only where a showing of prejudice accompanies the initial and distinct determination of ineffective assistance. This is true even in those cases where counsel's preparation and investigation have been adjudged woefully inadequate. *Washington v. Watkins*, 655 F.2d 1346, 1356. Turning now to the specific contentions, we address them in sequence.

B. Assistance Rendered by Goodwin's Trial Counsel

1. Counsel's General Attitude

To better understand the reasons for trial counsel's ineffective preparation, investiga-

13. In his opening argument, trial counsel stated, "I have been appointed by the court to defend Terry Goodwin." At the close of the state's presentation of documentary evidence in the sentencing phase of trial, co-counsel told the jury:

Well if you decided to impose the death penalty today and you decide to sentence him, Terry Goodwin, to the electric chair, historically speaking, you have got a very likely candidate. He is a little old nigger boy,

tion and handling of this case, an examination of the testimony presented to the state habeas corpus court and comments made during trial is revealing. The Walton County Superior Court appointed counsel and co-counsel to represent Goodwin. Addressing the jury during opening argument and again in the sentencing phase of trial, both counsel and co-counsel alerted the jury to the fact of their appointed status.¹² Counsel justified the reasons for doing so in his state habeas corpus deposition:

Q. I notice that either you or [co-counsel] in your argument made it clear to the jury that you were appointed.

A: Yes, sure.

Q: Why did you do that?

A: Well, you have to live out here.

Q: I'm not sure I understand, sir.

A: Well, as I say—if you're not a country boy—you live in the community and you get a reputation of representing, I got that around here for a while, of representing everybody that killed somebody. Well, they don't like you. They don't realize that everybody's entitled to a defense. It's just human nature, I suppose.

[13,14] The state interprets the references to appointed status as nothing more

he would not weigh a hundred and fifty pounds. He has got two court appointed lawyers appointed by this court to represent him to do the very best we can for him. He is poor. He is broke. He is probably mentally retarded. I dare say he has not got an I. Q. of over 70. He is uneducated. Probably just unwanted. This is the kind of people that we have historically put to death here in Georgia.

than a legitimate trial tactic aimed at soliciting sympathy from the jury. This interpretation is difficult to accept in light of the reason given by trial counsel. Goodwin, on the other hand, submits that this type of attitude explains why counsel failed to challenge the composition of the grand and petit juries, neglected to object to Wither-spoon violations, and failed to object to the use of leading questions by the prosecution. We tend to agree with Goodwin, but our reasoning goes further. Admitted concerns over community ostracism do more than inhibit a lawyer's actions at trial where his performance is visible by fellow citizens.

An attitude such as this impairs the vitality of investigation, preparation, and representation that all clients deserve, indigent or otherwise. Fears of negative public reaction to the thought of representing an unpopular defendant surely hamper every facet of counsel's functions. Moreover, reminding a jury that the undertaking is not by choice, but in service to the public, effectively stacks the odds against the accused. Although we deplore the sentiments expressed by Goodwin's trial counsel, we cannot overemphasize that the culpability of counsel is not the issue. Rather, our concern centers on the sixth amendment right of the defendant.

Goodwin asserts that his trial counsel's attitude and concerns over community pressure prevented him from challenging the composition of the grand jury pool and the composition of the petit jury pool. In response to inquiry from Goodwin's present counsel in the state habeas corpus proceeding, trial counsel explained why such a challenge was not considered.

Q: Why didn't you file a challenge to the composition of the grand jury?

A: I didn't think it would be to any avail.

Q: What do you base that opinion on?

A: I suppose its because I'm a native of this part of the country and I just don't think about the thing.

Q: What do you mean? Do you think that the grand jury was properly composed with a sufficient number of blacks and women and so on?

A: At that time?

Q: Yes.

A: I suppose I thought that's what it was, yes.

Q: You suppose you thought it was?

A: Subsequent events have proved that it wasn't.

Q: What led you to believe that it was at that time?

A: Just my knowledge of the people. I didn't give any thought to how many blacks and how many women and that sort of thing.

Q: Have you ever filed a challenge to the composition of the grand jury before, in other cases?

A: No.

Q: Has that ever been done in this county?

A: Not until six months after the Goodwin trial.

Q: That was in a civil case, I believe?

A: Yes.

Q: Why haven't jury challenges been filed before, do you know?

[District attorney]: I object. That's calling for speculation.

THE WITNESS [trial counsel]: I can't answer that, unless its like I said while ago; you live here, you know everybody. And when you know somebody

pretty well, you're very glad to get them on jury except in this particular case it didn't work out so well.

Q: Would you have felt any pressure in the community if you had challenged the composition of the jury?

A: Its possible. I mean, that's speculative.

Q: Do you remember we had a conversation earlier in which you stated that there would be that kind of community pressure if you challenged the jury?

A: I think there would be. But as I said, I don't know. Just like I told you while ago, the school kids were wanting to know why I was taking that Terry Goodwin case. The parents told me about it later on. I mean, that sort of thing goes on in this community, any community in the South.

Q: So the same reason that you wanted people to know that you were appointed in the case would lead you not to challenge the jury?

A: Sure.

In *Jones v. Brooks*, No. 75-52 (M.D.Ga. Mar. 29, 1976), the plaintiff class of black men and women of Walton County brought suit against the jury commissioners claiming underrepresentation on juries in violation of the thirteenth and fourteenth amendments to the United States Constitution. In response to the district court's order to show cause why relief should not be granted, the jury commissioners furnished the court and counsel for plaintiffs copies of new and revised grand jury and traverse jury lists. Because blacks and females were underrepresented on voter registration lists in Walton County, the jury

commissioners, utilizing a number of methods aimed at discovering the names of black and female citizens in the county, supplemented the jury lists with the names of black and female citizens not found on the voter registration lists. The ratio of blacks and females on the revised list was more statistically in line with the population breakdown reported in the 1970 census. Advising the district court that they intended to continue using procedures which facilitated proper representation of blacks and females on future jury lists, the plaintiff class acknowledged their satisfaction.

[15] The facts established in *Jones v. Brooks* indicate the amount of minority representation in the grand and petit jury pools in Walton County at the time Goodwin was indicted and tried. According to the 1970 census report, 27.7% of the Walton County population were black and 52.4% were female. Of the thirty grand jurors summoned in February, 1975, the term in which Goodwin was indicted, twenty were white males (66.7%), two were black males (6.7%), and eight were white females (26.7%). Of the 108 people summoned for criminal jury duty in August, 1975, the month of Goodwin's trial, ninety-eight were white (90.7%), ten were black (9.3%), eighty-three were male (76.85%), and twenty-five were female (23.5%). Thus, the disparity between the female population of Walton County and those on the grand jury list was 25.7%, and 29.25% with respect to the petit jury list. The disparity between the black population of Walton County and those on the grand jury list was 21%, whereas an 18.44% disparity existed with respect to the percentage of blacks on the petit jury list.¹⁴

14. More difficult to discern is the number of blacks on Goodwin's trial jury. Goodwin's trial

counsel testified in the state habeas corpus proceeding that he recalled only one black on

In *Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977), the Supreme Court reiterated the requirements for proving discrimination in grand jury selection within the context of an equal protection argument. Drawing support from earlier cases, the Court summarized the process:

Thus, in order to show that an equal protection violation has occurred in the context of grand jury selection, the defendant must show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs. The first step is to establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied....

Next, the degree of underrepresentation must be proved by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time....

Finally, as noted above, a selection procedure that is susceptible of abuse or is not racially neutral supports that presumption of discrimination raised by the statistical showing.... Once the

defendant has shown substantial underrepresentation of his group, he has made out a prima facie case of discriminatory purpose, and the burden then shifts to the State to rebut that case.

Castaneda, 430 U.S. at 494-95, 97 S.Ct. at 1280 (citations omitted). The record, through the statistics adduced in *Jones v. Brooks* and those prepared by Goodwin in connection with his habeas corpus petition in state court, indicates that a prima facie case of discrimination in grand jury selection, violative of the equal protection clause of the fourteenth amendment, could have been established, and in the absence of a showing of no discriminatory intent by the state, relief would have been granted. It is undisputed that women and blacks are a recognizable, distinct class under the first element of the prima facie test. *United States v. Perez-Hernandez*, 672 F.2d 1380, 1387 (11th Cir. 1982). Moreover, the statistics disclose racial and gender disparities existing in Walton County juries over a significant period of time, and therefore satisfy the second criteria of disproportionate representation.¹⁵ The Supreme Court

the jury. Goodwin's co-counsel remembered one or two blacks being on the jury. The district attorney's recollection placed three blacks on Goodwin's jury. From our examination of the record, we can only be certain that of the twelve jurors, at least nine were white.

15. According to Goodwin's statistics, of the potential jurors in the 1971 Walton County petit jury pool, 1,219 or 74.47% were white, 153 or 9.4% were black, and 265 or 16.2% were unidentified. Of this number, 1,349 or 78.8% were male, and 362 or 21.2% were female. With the unidentified persons as to race not distributed, the disparity for black representation on the 1971 petit jury pool was 66%. When the 265 unidentified persons are distributed according to race based on the census ratio for the county, the disparity for black representation was 49%. The disparity for fe-

male representation in the 1971 petit jury pool was 31.4%.

The same classifications for the potential jurors in the 1973 Walton County petit jury pool indicate that of the 1,090 summoned, 806 or 74.2% were white, 189 or 17.3% were black and ninety-three or 8.5% were unidentified. Of this amount, 568 or 52.1% were male and 522 or 47.9% were female. The disparity for black representation in 1973 was 10.4%, with the unidentified persons as to race not distributed. The disparity for black representation was 7.7% when the unidentified are distributed according to race based on the 1970 census ratio for Walton County. The female disparity for this time period was 4.5%. In *Jones v. Brooks*, the district court's order establishes that of the 407 potential jurors summoned over the period beginning August, 1974, through August, 1975,

has never fashioned precise guidelines for gauging disparate representation. See *Alexander v. Louisiana*, 405 U.S. 625, 630, 92 S.Ct. 1221, 1225, 31 L.Ed.2d 536 (1972). Nevertheless, Supreme Court and former Fifth Circuit precedent provide some guidance as to the magnitude of disparity needed to establish a prima facie underrepresentation claim. The variance here is sufficiently disproportionate to fall within the approximate boundaries delineated in those cases holding that statistical disparities establish prima facie violations. See, e.g., *Hernandez v. Texas*, 347 U.S. 745, 74 S.Ct. 667, 98 L.Ed. 866 (1954) (14%); *Preston v. Mandeville*, 428 F.2d 1392 (5th Cir. 1970) (13.3%). Finally, as the outcome of *Jones v. Brooks* indicates, the selection procedure utilized by Walton County officials prior to, and at the time of Goodwin's trial was susceptible to abuse. The county officials, in effect, conceded the racial inequalities in their system and took action to correct the imbalance.

[To excuse Goodwin's failure to timely challenge the composition of the grand and petit jury pools at this late day, the cause and prejudice requirements of *Francis v. Henderson*, 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976), must be satisfied. The state maintains that Goodwin has demonstrated neither the cause of, nor the prejudice resulting from this inaction. In *Francis*,

the Supreme Court held that where a state prisoner fails to make a timely challenge to the composition of the grand jury that indicted him and his right to do so has been waived under state law, he can collaterally attack the unconstitutional composition in federal court only if he can show both cause for failing to make the challenge and actual prejudice resulting therefrom. 425 U.S. at 542, 96 S.Ct. at 1711. Applying the state law in effect at the time of Goodwin's trial as directed by the *Francis* Court, failure to raise any objection to the composition of the grand or petit jury at or before trial constitutes a waiver of the right to challenge the composition of those juries.¹⁶ Because Goodwin waived his right to challenge the composition of the grand and petit juries under state law, normal procedure would require us to determine whether he has demonstrated both cause and actual prejudice. Goodwin, however, argues that the state's reliance upon *Francis v. Henderson* is misplaced and explains that his argument attacking the alleged unconstitutional composition of the juries was not raised as a substantive issue. Rather, Goodwin stresses that the argument is an element asserted for the purpose of bolstering his claim of ineffective assistance of counsel.

[16] Accordingly, Goodwin does not assert the merits of this argument in an at-

358 or 87.96% were white, forty-nine or 12.04% were black, 301 or 73.96% were male, and 106 or 26.04% were female.

16. Ga.Code Ann. § 50-127(1) was amended by 1975 Ga.Laws 1143 and became effective April 24, 1975, approximately four months before Goodwin's trial. The section reads in pertinent part:

The right to object to the composition of the grand or traverse jury will be deemed waived under this Section, unless the person

challenging the sentence shows in the petition and satisfies the court that cause exists for his being allowed to pursue the objection after the conviction and sentence has otherwise become final.

Prior to amendment, confusion existed as to whether the right to challenge grand and petit jury composition in a collateral proceeding was available, given the petitioner's failure to do so before trial. See *Stewart v. Ricketts*, 451 F.Supp. 911 (M.D.Ga.1978).

tempt to seek relief thereunder.¹⁷ Moreover, the State of Georgia has never had the opportunity to rebut Goodwin's apparently prima facie case. For these reasons, we refuse to grant substantive relief on this claim. We address the merits, however, within the framework of Goodwin's sixth amendment allegation as representing an example of trial counsel's ineffective assistance. Combined with trial counsel's other failings discussed herein, his reasons for not challenging the composition of the grand and petit juries reveal the assistance he was "reasonably likely" to render. We disagree with the state's interpretation of trial counsel's testimony as indicating "a conscientious and studied decision not to file a jury challenge." On the contrary, we view trial

counsel assertions as indicating a divided allegiance. These assertions exhibit the lack of vitality attributed to Goodwin's defense and strongly suggest the location of his loyalties. Our adversarial system of justice will be quickly eroded if attitudes such as the one evinced by Goodwin's trial counsel are allowed to dictate when action on behalf of an accused is to be undertaken.

2. The Failure to Interview Crucial Witnesses

In this capital murder case, Goodwin's trial counsel failed to interview at least five prosecution witnesses who testified at trial. Among the five were the deputy who took

17. Because of this position, Goodwin has made no effort to demonstrate cause and prejudice as mandated by *Francis v. Henderson*. Nevertheless, a plausible argument can be asserted that, in fact, both the cause of the waiver and the prejudice resulting therefrom exist in the instant case. The cause for the failure to make the timely challenge is evidenced by the testimony of trial counsel adduced in the state habeas corpus proceeding. Trial counsel filed no objection to the composition of the grand and petit jury lists because he was a "native" of that part of the country, and just "didn't think about the thing." Moreover, the reason for making known his appointed status—concerns over his reputation—was again cited as a reason for not challenging the jury. This is not the kind of hollow claim alleged in *Lumpkin v. Ricketts*, 551 F.2d 680 (5th Cir. 1977). Faced with a bare allegation of ineffective assistance of counsel as the cause for failure to challenge a grand jury's composition, the Lumpkin court refused to sanction such a meager contention as demonstrating a legitimate cause. 551 F.2d at 682-83. The argument in Goodwin's case, however, draws its support from the testimony of the individual whose duty it was to investigate the propriety of such a challenge. As for the waiver's prejudicial effects, the statistics reveal that a prima facie case of discriminatory purpose in the grand jury selection process could have been established. Goodwin would not necessarily have prevailed in such a case,

but enough evidence could have been produced in order to shift the burden to the state.

In *Lumpkin v. Ricketts*, the petitioner assigned error to the district court's determination finding a waiver of the right under state law to contest the constitutionality of the composition of the grand jury that indicted him. Primarily concerned with the allegation that the right had not been waived under state law, the former Fifth Circuit relied on Georgia case law existing at the time of the petitioner's trial to hold that a failure to challenge the grand jury array before trial resulted in a waiver. See, e.g., *Dennis v. Hopper*, 548 F.2d 589 (5th Cir. 1977); *Blevins v. State*, 220 Ga. 720, 141 S.E.2d 426 (1965). Thus, the court next addressed the question of whether cause and prejudice had been demonstrated. The petitioner contended that his indictment was the product of a venire that suffered from the same defect disapproved by the Supreme Court in *Whitus v. Georgia*, 385 U.S. 545, 87 S.Ct. 643, 17 L.Ed.2d 599 (1967). The court rejected this contention and noted that prior to trial, counsel for both parties had agreed on the identity of the grand jury pool. 551 F.2d at 682 n.3. As alluded to above, petitioner claimed sufficient cause for the failure was present in his trial counsel's ineffective representation. The facts disclosing the existence of cause and prejudice in the instant case undeniably form a more legitimate basis for examining the jury discrimination issue than those advanced in *Lumpkin*.

Goodwin from his home in the early morning hours, the victim's sister, and three other witnesses, all of whom entered incriminating statements against Goodwin. Deputy Nathaniel Rakestraw testified at trial that he met with another deputy, Livingston O'Kelly, the evening before Goodwin was taken to the station house. Rakestraw explained why he went to Goodwin's house:

Q: All right. Where were you when you got that information?

A: I was at the shopping center. I met Deputy O'Kelly out there at the shopping center.

Q: All right. And what information did he give you concerning the defendant?

A: He told me that a lady had told him that she was walking past a bunch of boys in a group talking and Terry Goodwin was one of them. And she heard him make the statement he had killed a man and left him down near Social Circle.

Acting on this information, Rakestraw then went to Goodwin's residence and brought him in for questioning.

In the state habeas corpus proceeding, trial counsel stated that these deputies were never interviewed because the files containing their statements were made available to him by the sheriff of Walton County and by the prosecution. Hence, he saw no need to challenge them. Deputy O'Kelly was not called upon to testify at trial. Counsel confirmed this in response to questioning by Goodwin's state habeas corpus counsel.

Q: Okay. Do you remember whether or not you talked to an Officer O'Kelly?

A: I don't believe I interviewed him, no. I know O'Kelly very well. He's deputy sheriff. If I remember correctly, that may be the one that Goodwin was sup-

posed to—some woman told O'Kelly that Goodwin had said that he committed this crime.

Q: But you did not talk to Officer Rakestraw?

A: I don't recall it.

Q: Okay. Did you talk to office O'Kelly? You may have already answered this. Did you talk to O'Kelly about this case?

A: I don't remember.

Q: Do you think that you probably did?

A: I talked to him yea. I didn't have any formal interview that I can remember.

Q: Okay. How did you find out that Officer O'Kelly had talked to a woman about it?

A: One of the deputies told me.

Q: Who was that that told you?

A: I don't remember that.

Q: Did you find out the name of the woman that had told Officer O'Kelly?

A: I never did learn that.

Ed Mitchell, a listed potential prosecution witness who testified at trial, was not interviewed. While visiting Mitchell at his home some two weeks before the killing, Mitchell claimed that Goodwin, without provocation or apparent reason, impetuously remarked, "I oughta kill somebody and take their car." Mitchell testified that he considered Goodwin to be kidding, and did not pay much attention to the statement. As for Mitchell's testimony, trial counsel thought it unnecessary to challenge its veracity. He explains:

Q: Let's get over to some of those other witnesses that testified. One of the black boys you talked about, I believe, was Ed Mitchell?

A: Yea, he testified at trial.

Q: Were you able to talk to him prior to trial?

A: No.

Q: Was he on the list of witnesses that you were given from the state as a potential prosecution witness?

A: I think he was.

Q: Okay. Now, he made a rather, if I remember, a rather damaging statement at trial. I believe that it was to the effect that he—

A: Told him he was going—

Q: Terry had told him that he was going to kill and rob some boy that operated the pool hall. When did you first find out that Mitchell was going to testify to that?

A: I think I read his statement in the police files, in the deputy sheriff's files.

Q: Okay. In Mitchell's written statement that you saw—I believe you said that this was part of the statement the DA turned over to you, you were able to see?

A: They made it available to me. I didn't take copies of it, but I read them.

Q: In that statement, did Mitchell say that Terry had said what he testified to at trial?

A: Yes.

Q: Why didn't you go out and talk to Mitchell about that statement prior to trial?

A: I didn't think it was necessary.

Q: Do you think that Mitchell had any ulterior motive in testifying to the police?

[District attorney]: Object to that. I think it's just speculation.

THE WITNESS: I couldn't say. I never believed any of them, any of those colored boys, because it seemed like, appeared at the time, that they were doing that to help themselves with the sheriff.

Trial counsel also did not interview Benny Cooper, a listed potential prosecution witness whose testimony placed Goodwin at the scene of the crime the afternoon after the killing. Cooper explained that while traveling on his employer's bus, the driver stopped to pick up a hitchhiker near the dirt road where the victim's body was later discovered. At the courthouse the following day, Cooper told Sheriff Franklin Thornton that his bus had picked up a hitchhiker along the side of the particular road. Thornton then showed Cooper a photograph of Goodwin and asked Cooper if this was the hitchhiker. Cooper answered affirmatively. He also made an in-court identification of Goodwin as the hitchhiker. Regarding Cooper's testimony and his damaging identifications, trial counsel again thought it unnecessary to raise any doubts:

Q: Did you interview Benny Cooper?

A: No.

Q: My recollection of the transcript is that Mr. Cooper, when he was there in the police station, said that he'd seen a man out on the road, and the sheriff handed him a picture and said, 'Is this the man that you saw?' Did you consider filing a motion to challenge the procedure that that identification was made by?

- A: No.
- Q: Why not?
- A: I didn't think it was necessary.
- Q: Did you think it would lose?
- A: Huh?
- Q: Did you think it wouldn't be a successful motion?
- A: Well, I didn't think that the testimony, as he gave it was important enough to make any objections to it.
- Q: [The prosecuting attorney] thought it was important enough to use in the trial, use in his closing argument?
- A: Yea, that's right. Course, I'll tell you how I am about things like that. Unless I think they'll accomplish something, I don't make an objection. Course I know as far as you fellows are concerned, that's very important but the only thing that I seriously tried to get thrown out was the confession, which, if I have been successful in that, they'd have never had a conviction. The evidence they gathered from that confession—

Trial counsel indicated in his state habeas corpus deposition that, in his opinion, Mitchell and Cooper were "snitches," informants for the sheriff's department in return for leniency in other crimes or investigations. His opinion was based upon what deputies had told him. He characterized the witnesses as unreliable, capable of fabricating a story to remain in good standing with the law. No effort, however, was made to question their versions.

- Q: Do you share my feelings that those little tidbits seem to be a little bit too pat? And, if so, what did you do to find out whether or not they were fabricated or placed in someone's ear?

- A: Well, actually, I didn't know definitely before we went to trial what they were going to testify to. I knew the association, and I knew of no way to counteract that.

- Q: Do you think that these were crucial? Do you think that these statements were, in your opinion, were crucial in terms of the conviction for robbery?
- A: No, no. I still don't think he robbed him. And I don't think they proved it.
- Q: But you don't think that the statements that he was going to rob somebody were crucial in the conviction of the robbery?
- A: No, I don't. I think it was just bragging to his buddies, is what I thought at that time; still believe it.
- Q: But you made no effort personally to contact any of these people?
- A: No.

3. *Failure to Effectively Challenge the Events through which Goodwin was Brought into Custody*

Upon receiving the information from deputy O'Kelly, deputy Rakestraw, accompanied by deputy Wiggams, went to Goodwin's home. When he arrived sometime after midnight, Goodwin's mother answered the door and let Rakestraw in. On cross-examination at trial, Rakestraw explained the situation this way:

- Q: Okay. Now when you knocked on the door, did you tell Mrs. Goodwin what you wanted?
- A: She first asked who it was, and I told her the deputy sheriff.
- Q: When she opened the door?
- A: Right.

Q: You went in. Where was Terry?

A: He was in the back bedroom, in bed.

Q: Was he undressed?

A: Yes, sir.

Q: Did you tell him to get up and get dressed?

A: I told him

Q: What did you tell him? Just tell me what you told him.

A: I told Terry I wanted to talk to him down to the office, to get up and get his clothes on.

Q: And he did not ask you what you wanted to talk with him about?

A: No, sir.

Q: You did not have a warrant?

A: No, sir.

Q: Is it customary to go out to people's houses without a warrant or without seeing some crime committed and go in?

A: Well I was invited in.

Q: You were invited in?

A: Plus, I wasn't suspect of anything.

Rakestraw claims that he did not arrest or intend to arrest Goodwin at that time, rather, he was a suspect in the case and he accompanied him willingly to the sheriff's office. Goodwin was taken to another deputy who advised him of his rights. Although Goodwin was subsequently transferred to different offices, he remained in the custody of sheriff's deputies until his confession was obtained on Saturday evening.

Goodwin now contends that Rakestraw's statement was not merely a request to accompany the deputy for questioning. To the contrary, Goodwin asserts that at the moment deputy Rakestraw told him "to get up and get your clothes on" he was under arrest, and, because probable cause did not

exist to support it, the arrest was illegal. Goodwin further claims that the state has the burden of proving voluntary consent and the testimony of the seizing officer in no way satisfies this burden.

According to Goodwin's trial counsel, the defensive strategy was two-pronged: The first objective was to suppress the confession and failing that, to obtain a life sentence. Attempts to bargain for a plea were halted when trial counsel learned that the district attorney was steadfastly seeking the death penalty. On the day of trial, trial counsel attacked Goodwin's confession by filing a broadly worded motion to suppress. The motion was framed in a manner so as to challenge deputy Rakestraw's actions as constituting an illegal arrest. The motion states: "On the 12th day of April, 1975, at about 2:00 a. m., defendant was roused from his bed at home and arrested by deputies Rakestraw and Palmer without warrant and carried to the Walton County Sheriff's Office." In his argument in support of the motion to suppress, trial counsel never proceeded with the theory that the circumstances amounted to an illegal arrest and in denying the motion, the trial court made no specific finding as to whether Goodwin was illegally arrested or as to the existence of probable cause. Similarly, on appeal to the Georgia Supreme Court, Goodwin's trial counsel did not enumerate as error the admission of the confession because of an illegal arrest, rather, he asserted that Goodwin's mental capacity effectively prevented him from knowingly waiving his rights. Goodwin asserts a number of reasons why no challenge to the deputies' actions was taken, all of which are supported by the record. Because trial counsel never interviewed deputy Rakestraw, the deputy who took Goodwin to the sheriff's office, trial counsel never learned

how the deputies obtained sufficient information to arrest him nor did he find out the name of the person who allegedly told deputy O'Kelly the contents of the conversation she had overheard. Moreover, trial counsel was unaware that under the parameters of the poisonous tree doctrine, an illegal arrest may affect the admissibility of a subsequent confession. Trial counsel's response to questioning regarding this issue in the state habeas corpus proceeding is enlightening:

Q: Okay. Do you, thinking back on the case and what you knew about it, do you think that the arrest was a legal arrest?

A: No, I—

[District attorney]: Object.

THE WITNESS: I don't really believe that.

Q: What do you base that opinion on?

A: Well, to get the warrant in the first place, they had to have a reasonable ground to believe that he was involved in it. And I never did think that they had that. I never had found out how they, except for the so called statement by O'Kelly and the other officer that this woman—

Q: Rakestraw?

A: Rakestraw, yeah. I never did know how they really got out there to get into his house and pick him up.

Q: You never found out how they got enough information to go out and arrest him in the first place?

A: Yeah, that's right.

Q: Now, what you're talking about is when they went out, I believe it was like twelve-thirty in the morning on the 12th.

A: That's right.

Q: Explain that a little bit. What do you mean, you never found out?

A: Well, they kept talking about the telephone calls—

Q: Right.

A: —and tracing them out to him. They never, at any time did they ever identify, positively identify, that it was Goodwin.

Q: That it was Terry?

A: But they must of had some information, because he admitted it.

Q: What efforts did you make to try to get that information?

A: No more than asking the deputies and the officers how they happened to go out there.

Q: Are you familiar with the *Wong Sun* case?

A: The what?

Q: *Wong Sun v. United States*.

A: No.

Q: Never heard of that case?

A: No, I haven't.

Q: Are you familiar with the doctrine of the Fruit of the Poisonous Tree?

A: Yes, I know that. In fact, [defense co-counsel] in his, I believe in arguing before the jury, he brought that out. I've got a bad memory in late years.

Q: You said before that you thought that the arrest was illegal?

A: Yes.

Q: Do you think, in your professional opinion, under the doctrine of poisonous tree, that might have had an effect on the admissibility of the confession?

A: No sir.

Q: I sorry?

A: No sir.

In *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), the Supreme Court, expounding on the contours of the exclusionary rule, declared that the rule not only prohibited from use at trial tangible evidence obtained as a direct result of an unlawful invasion, but barred the use of verbal statements by the accused as well. 317 U.S. at 485, 83 S.Ct. at 416. "Thus, verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest . . . is no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion." 317 U.S. at 485-86, 83 S.Ct. 416 (footnote omitted). According to Goodwin, this lack of understanding of the legal principles set out in *Wong Sun* most likely explains trial counsel's inaction.¹⁸

4. Other Failings by Trial Counsel

Goodwin enumerates other instances where he claims trial counsel's actions or inactions fell below the requisite standard. He cites as ineffective assistance his counsel's failure to object at trial and on motion for new trial and on appeal the improper exclusion of veniremen in violation of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). During voir dire, the veniremen were asked collectively if they conscientiously opposed capital punishment, and, if so, to stand up. Four veniremen stood up. The district attorney then asked these four, "Are your reserva-

tions about capital punishment such that you could not vote truly and fairly and impartially on the issue of whether or not a person charged is guilty or not guilty of the crime charged? If so, raise your hand." Mr. Hayes responded, "Well I could not vote." The district attorney then stated, "Could not vote at all? Your honor, it appears that Mr. Hayes and Ms. Malcom are disqualified." The trial court agreed and directed Hayes and Malcom to take a seat in the courtroom. When Goodwin's trial counsel asked permission to ask questions of Hayes and Malcom, the trial court informed counsel they had been disqualified. Trial counsel then asked, "Did they say they were unalterably opposed to capital punishment?" The trial court replied affirmatively. Notably absent, however, is any statement from the mouth of Ms. Malcom regarding her reservations about capital punishment. She was never asked to explain her position.

[17] The Supreme Court's mandate in *Witherspoon* is well known. It teaches that "[u]nless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that that is his position." 391 U.S. at 515 n.9, 88 S.Ct. at 1773 n.9 (emphasis added). The state may validly implement the sentence of death only where the

jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1)

18. In his argument to the trial court on Goodwin's motion to suppress evidence obtained from the search warrant, co-counsel stated "that under the rules of the fruit of the poison tree doctrine, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441, all testimony concerning these ar-

ticles is, as well as the articles themselves, should be scratched." Obviously, co-counsel was aware of the *Wong Sun* decision; he did not understand, however, its reasoning and proper application regarding the suppression of evidence obtained via an illegal arrest.

that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.

391 U.S. at 522 n.21, 88 S.Ct. at 1771 n.21 (emphasis in original). A raising of the hand fails to satisfy *Witherspoon's* calling for an unambiguous statement on the question of whether a venireman "would automatically vote against the imposition of capital punishment no matter what the trial might reveal" 391 U.S. at 516 n.9. The law in this circuit demands strict adherence to *Witherspoon's* requirements. See, e.g., *Granviel v. Estelle*, 655 F.2d 673 (5th Cir. 1981); *Burns v. Estelle*, 626 F.2d 396 (5th Cir. 1980) (en banc).

In its consideration of this issue, the district court adopted the proposed finding of the magistrate which concluded that Malcolm had made it unmistakably clear that her attitude toward the death penalty would have prevented her from making an impartial decision as to Goodwin's guilt or innocence. Trial counsel offered the following explanation at the state habeas corpus hearing as to why no objection to Malcolm's removal was filed.

Q: Now, as a result of those proceedings there were, I believe, four jurors disqualified.

A: Disqualified, I think so. Three men and a woman.

Q: Alright. And you did not object to their disqualification. I want to know why.

A: Because they said they were unalterably opposed.

Q: Okay.

A: According to my question.

Q: Did you object to the judge's not allowing you to question them to rehabilitate them?

A: No, not after they made the statement.

Q: But you wanted to ask them a few questions to rehabilitate them?

A: I didn't understand what they said, was the reason I was asking them.

Q: I see. Is it your legal opinion that you could or could not, that you should or should not, have an ability to rehabilitate the jurors?

A: Not after they made the statement.

Q: It's your legal opinion that you have no right to rehabilitate the jurors?

A: [District attorney]: I object to that. THE WITNESS: I don't think so, no sir.

Q: Some of these people didn't make a statement at all, they just raised their hand or stood up.

A: The only one I remember on my reading that, was the woman that didn't answer the question.

Q: What about her?

A: I don't know about her. At that time if she didn't, I didn't catch it. But after reading what you read there while ago, it seemed that she didn't make any statement.

Q: Did you want to question her?

A: No, not after the judge said what he did.

Q: You thought that barred you from asking any questions?

A: No, it didn't bar me, but I didn't see any necessity. If they'd made the

statement that they were unalterably opposed to it and there wasn't any changing their minds, why, I didn't see what I'd accomplish by going on and doing it further.

Trial counsel was unaware that Malcom had not affirmatively stated her position on capital punishment. When questioned if he had noticed the Malcom omission upon review of the trial transcript in preparation of the motion for a new trial and direct appeal, trial counsel informed that his co-counsel reviewed the transcript for *Witherspoon* violations. Co-counsel testified that he did not review the transcript for *Witherspoon* violations.

In short, trial counsel simply failed to notice that Malcom never affirmatively stated her unalterable opposition to the death penalty, hence, no objection to her excusal was entered. Complete fault, however, cannot be placed upon trial counsel because of the apparent obstruction by the trial court in refusing the request to question the excluded veniremen further. Contrary to the trial court's statement, Malcom did not say she was unalterably opposed to capital punishment. Nevertheless, this glaring omission in the record was not discovered in the investigation and preparation of Goodwin's motion for a new trial and subsequent appeal.

Among the other instances where Goodwin contends counsel was ineffective during his trial, he cites his trial counsel's failure to object to the victim's family being allowed to sit inside the bar of the court. Trial counsel explains why no objection was raised.

Q: Can you tell us where the Studdard family sat during the trial?

A: Inside the rail, right back of defense counsel's table.

A: Approximately how far is that from the jury?

A: It would be twenty, twenty or twenty-five feet. Maybe not that much. Well, you know where the jury was.

Q: Did you object to that procedure?

A: No, I didn't object to it.

Q: Why not?

A: I didn't think it was important.

Trial counsel failed to object to the trial court's failure to charge the jury on mitigating circumstances as required by Ga. Code Ann. § 27-2534.1(b). See footnote 6. Moreover, trial counsel failed to request a charge on Goodwin's diminished capacity, the focal point of the entire defense. No explanation was given why such a request was not tendered to the trial court. Trial counsel also failed to object to the admission of Goodwin's prior conviction records for forgery which were introduced during the penalty phase of the trial. By statute in Georgia, evidence of prior criminal convictions are admissible in the penalty phase provided the state has informed the defendant of its intention to use such evidence. Ga. Code Ann. § 27-2503(a), (b). For purposes of the motion to suppress the confession hearing only, the district attorney introduced records of Goodwin's 1974 forgery convictions in an attempt to demonstrate Goodwin's ability to knowingly and intelligently waive his rights as he had allegedly done in conjunction with the 1974 convictions. Goodwin's trial counsel did not object to their introduction. The records were labeled state's exhibits number twenty-nine and thirty. Later, in the sentencing phase, the district attorney tendered into evidence

for the purposes of the trial the conviction records. Defense counsel did not object. The record is devoid of any document giving notice of the intention to introduce the prior conviction records at the presentencing hearing. The record does reflect, however, that in the forgery convictions, Goodwin was represented by one of the two attorneys appointed to represent him in the murder trial in question. Obviously then, his trial counsel was well aware of the prior convictions. Awareness, however, is not tantamount to knowledge of the state's intended reliance upon those convictions as evidence in aggravation. See *Gates v. State*, 229 Ga. 796, 194 S.E.2d 412 (1972).

Trial counsel failed to object on more than one occasion to the prosecution's use of leading questions. A conspicuous example: "Do you recall having any conversation with Terry Goodwin concerning a robbery or murder prior to the time this man [the victim] got [sic] missing?" The witness asked the prosecutor to repeat the question, which he did. The witness answered affirmatively. Queried if he thought this was a fairly leading question, trial counsel thought so but did not object because, in his opinion, the witness was of low intelligence. No evidence was ever presented as to the intelligence of this witness nor did defense counsel use cross-examination to reveal that the witness's intelligence was other than normal.

D. Goodwin's Trial Counsel Rendered Ineffective Assistance

[18] Adopting the recommendation of the magistrate, the district court concluded that Goodwin's two trial attorneys provided reasonably effective assistance of counsel throughout all phases of his trial. We disagree. Assessing the effectiveness of trial counsel by the standards set forth herein,

we hold that trial counsel fell below that level of effectiveness mandated by the interpretation of the sixth amendment right. Our examination of the areas in which Goodwin contends his counsel provided ineffective assistance compels us to conclude that this counsel was not reasonably likely to render, and did not render, reasonably effective assistance. *MacKenna v. Ellis*, 280 F.2d 592, 599 (5th Cir. 1960), *adhered to in pertinent part on rehearing en banc*, 289 F.2d 928 (5th Cir.), *cert. denied*, 368 U.S. 877, 82 S.Ct. 121, 7 L.Ed.2d 78 (1961). In the totality of circumstances of this case, counsel's lack of investigation and general attitude, when taken together, deprived Goodwin of the zealous representation due any client, even those accused of committing atrocious acts. Trial counsel neglected an examination of the grand and petit jury selection procedures in Walton County at the time in question. Such an examination would have revealed glaring disparities in racial and gender representation. Additionally, trial counsel failed to make an informed evaluation of a potential defense, namely, that Goodwin was illegally arrested. See *Gaines v. Hopper*, 575 F.2d at 1149-50 (habeas corpus relief proper where failure to investigate deprived petitioner of defense otherwise assertable). By his own admission, trial counsel's lack of investigation into the circumstances surrounding the taking of Goodwin from his bedroom prevented an evaluation as to the existence of probable cause. On behalf of Goodwin's defense, we glean from the record that trial counsel interviewed Goodwin at least five times prior to trial. Co-counsel visited the scene of the crime on two occasions. Attempts to plea bargain with the district attorney proved unsuccessful. Pre-trial motions to quash the indictment and suppress the confession and evidence obtained

from the search of Goodwin's home were filed. At one point, trial counsel considered filing a motion requesting a change of venue but ultimately decided otherwise. Counsel filed a timely motion for new trial and, upon its denial, argued Goodwin's appeal in the Georgia Supreme Court. When counsel's performance is placed in the balance of the entire record, however, we can only conclude that his failures were grossly disproportionate to the positive aspects of his representation and in our view amounted to ineffective assistance.

[19, 20] Finding the assistance rendered by Goodwin's trial counsel constitutionally inadequate does not complete the inquiry. As *Washington v. Watkins* emphasizes, "[t]he law of [the former Fifth Circuit] is as yet unclear as to the precise degree of prejudice that a defendant must demonstrate before he is entitled to habeas corpus relief on grounds that he received ineffective assistance of counsel, although it is clear that some degree of prejudice must be shown."

19. See *Washington v. Watkins*, 655 F.2d at 1362 n.32 and cases cited therein. The obscurity surrounding the prejudice aspect of ineffective assistance claims should soon be clarified by this court sitting en banc. We note that the issue of the degree of prejudice which must be demonstrated in an ineffective assistance of counsel case is involved in the case of *Washington v. Strickland*, 673 F.2d 879 (5th Cir. 1982) (Unit B) which was orally argued before the en banc court on June 15, 1982. We need not await the decision of the en banc court, however, because we conclude in the instant case that the prejudice is so obvious that a sufficient degree of prejudice exists under any standard that the en banc court might adopt.

20. Goodwin contends that the circumstances in this case are indistinguishable from those found in *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979). In *Dunaway*, the Supreme Court was confronted with a situation where police officers acting on less than probable cause located a suspect at a neighbor's house. The officers then took the

655 F.2d at 1364 (footnote omitted, emphasis in original).¹⁹ Goodwin maintains that a sufficient degree of prejudice flows from the existence of both a meritorious grand jury discrimination claim and a viable defense that went unheeded due to the lack of investigation. Had counsel investigated, Goodwin claims, he would have discovered that at the time Goodwin was considered under arrest, no probable cause existed to effectuate the seizure. The record appears to bear Goodwin out. Sheriff Franklin Thornton was asked during cross-examination if he knew personally or if his records indicated when Goodwin was placed under arrest. He testified that when the deputies brought him from his home to the sheriff's office after midnight and detained him in the jail, Goodwin was counted as arrested. As noted previously, it is Goodwin's contention that he was under arrest for fourth amendment purposes the moment deputy Rakestraw told him to get up and get dressed.²⁰ Rakestraw's decision to pick up

suspect into custody and although he was never told he was under arrest, he would have been restrained had he sought to leave. While in custody and after Miranda warnings, the suspect made incriminating statements linking himself to the crime. The Court held that whether or not the seizure was technically characterized as an arrest, it was so indistinguishable from a traditional arrest that it must be supported by probable cause. 422 U.S. at 216, 99 S.Ct. at 2258. Additionally, the Court concluded that the connection between the illegal police activity and the incriminating statements was not sufficiently attenuated so as to permit their use at trial. 422 U.S. at 219, 99 S.Ct. at 2260.

Regarding Goodwin's factual argument, he maintains, although he has never testified as to its truth, that a dispute exists as to whether he accompanied the deputies willingly. While the event as testified to by deputy Rakestraw unquestionably lends itself to such an inquiry, the inadequacy of the record prevents us from addressing this contention. No deputy has testi-

Goodwin was precipitated by deputy O'Kelly's information concerning assertions by an unidentified girl claiming to have overheard Goodwin make incriminating statements. Without anything more, this is not enough to establish probable cause to arrest. Probable cause to arrest "exists where 'the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Draper v. United States*, 358 U.S. 307, 313, 79 S.Ct. 329, 333, 3 L.Ed.2d 327 (1964), quoting *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). Where the information leading to the formulation of an officer's reasonable belief is supplied by an informant, the adequacy of such information must be tested by the two-prong analysis of *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) and *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969). Quoting *Aguilar v. Texas*, 378 U.S. at 114, 84 S.Ct. at 1514, the former Fifth Circuit stated:

To rely on an informant's report to establish probable cause, it must first affirmatively appear that the agents were informed of:

[first] some of the underlying circumstances from which the informant con-

cluded whether Goodwin would have been free to remain in bed despite the statements made to him by deputy Rakestraw. Accordingly, we refrain from reaching the merits of this factual claim.

21. Although we decline to decide the merits of Goodwin's fourth amendment challenge on either a legal or factual basis, this does not foreclose our performance of the proper analysis for deciding the ineffective assistance claim. Our purpose in reciting the factual circumstances surrounding the deputy's actions is in-

cluded that his information was accurate, and [second] some of the underlying circumstances from which the officer concluded that the informant " " was 'credible' or his information 'reliable.'

United States v. Squella-Avendano, 447 F.2d 575, 579 (5th Cir.), cert. denied, 404 U.S. 985, 92 S.Ct. 450, 30 L.Ed.2d 369 (1971). The state has failed to satisfy either of the *Aguilar-Spinelli* requirements for the establishment of probable cause through information supplied by an informant. While the factual inadequacy of the record presents an impediment to holding that Goodwin was under arrest at the moment he was told to get up and get dressed, the record does indicate that nothing transpired between the time Goodwin was taken from his home until detained at the station that established probable cause to arrest. Trial counsel was never aware of the lack of probable cause, nor was he aware of Thornton's testimony regarding the question of arrest until he heard it at trial.²¹

Trial counsel's concentration on the confession as involuntary was not the result of an informed decision. Rather, his challenge based on Goodwin's mental capacity as the only possibility for suppression was the product of an erroneous legal conclusion. Although he states many times in his state habeas corpus deposition that he believed

tended only for a better understanding of how these circumstances relate to the ineffective assistance argument. Because the circumstances present a multitude of unanswered questions, most notably, the question concerning probable cause to arrest or the lack thereof, it can hardly be said that Goodwin's trial counsel's inadequate investigation in this area enabled him to present an effective case. The essence of this lack of investigation lies in its prejudicial effect to Goodwin's defense.

Goodwin was illegally arrested, trial counsel's misunderstanding of the fruit of the poisonous tree doctrine led him to believe that an illegal arrest provided no foundation for suppressing a confession.²² See *Herring v. Estelle*, 491 F.2d 125, 128 (5th Cir. 1974) (lack of familiarity with facts and law relevant to case causes counsel to fall below the minimum level required); *Cara-way v. Beto*, 421 F.2d 636, 637 (5th Cir. 1970) (counsel is ineffective unless acquainted with facts and law of case).

[21] Stemming from the revelation that probable cause to arrest was lacking, Goodwin claims the evidence obtained as a result of the illegal seizure, most notably, his confession, could have been suppressed. According to Goodwin, because trial counsel was unaware that an illegal arrest could affect the admissibility of a subsequent confession, his defensive efforts were directed toward events transpiring after the confession was obtained. Thus, the trial court was never called upon to address the legality of the arrest, nor was it requested to conduct an inquiry into the factors leading up to the confession to determine whether the deputy's conduct was so attenuated

22. On the arrest question, counsel's state habeas corpus deposition is somewhat conflicting. Although counsel states that he believed Goodwin to be illegally arrested, he also states that "they" didn't arrest Goodwin. This statement not only conflicts with counsel's previous assertions that Goodwin was illegally arrested, but also conflicts with Sheriff Thornton's testimony to the effect that Goodwin was considered under arrest when the deputies brought him into the sheriff's office early Saturday morning. The inconsistency is puzzling but not inexplicable considering the minimal effort spent investigating the facts and circumstances leading up to Goodwin's apprehension.

23. The Supreme Court conducted the attenuation inquiry without the benefit of the trial court's consideration of the question in *Brown*

from the confession by the presence of intervening circumstances so as to render the confession reliable and hence, admissible.²³ We cannot state with a sufficient degree of assurance that the confession would have been suppressed had counsel realized the law provided an avenue for such a measure. Nevertheless, because the possibility of suppression existed, it cannot be said that trial counsel's ineffective preparation and investigation was "harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967).

[22] The magnitude of trial counsel's misunderstanding cannot go unnoticed or be deemed a common mistake by the average criminal lawyer. We hold trial counsel's ineffective assistance evidenced by his lack of thorough investigation deprived Goodwin of a potential defense. In addition, the decision to raise what would have been a credible challenge to the composition of the grand jury was unperceived. We cannot disregard these conspicuous errors. We therefore reverse and remand to the district court with directions to issue the writ of habeas corpus.²⁴

v. *Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975). In *Brown*, the Court examined the connection between an unlawful arrest and subsequent incriminating statements and determined that in the absence of any "intervening event of significance," the statements were inadmissible. *Brown*, 422 U.S. at 604-05, 95 S.Ct. at 2262. In *Brown*, however, the Court approached the question in the context of an alleged fourth amendment violation. Because Goodwin's habeas corpus petition alleges a violation of his sixth amendment right, the admissibility *vel non* of his confession is not controlling on the resolution of the ineffective assistance contention.

24. Our holding that counsel's ineffectiveness deprived Goodwin of his sixth amendment right to counsel reasonably likely to render effective

CONCLUSION

For the reasons specified in Part III, we reverse the district court's judgment insofar as it upholds the trial court's capital sentencing instructions. Accordingly, Goodwin's death sentence is set aside. *Spivey v. Zant*, 661 F.2d at 478-79. We reverse the district court's finding that Goodwin's trial

assistance is in no way meant to be viewed as a hard and fast rule granting habeas corpus relief on ineffective assistance claims whenever a failure to investigate the facts and circumstances of a particular case occurs. The duty to investigate is not limitless and it does not necessarily follow that every time counsel fails to pursue all lines of inquiry will it mean that his assistance is ineffective. *Washington v. Watkins*, 655 F.2d at 1356. "[C]ounsel for a criminal defendant is not required to pursue every path until it bears fruit or until all conceivable hope withers." *Lovett v. Florida*, 627 F.2d 706, 708 (5th Cir. 1980). Based on the record before us, however, this is a case where habeas corpus relief is justified.

Under ordinary circumstances, when the state court has provided an opportunity for a full and fair adjudication of a fourth amendment claim, such as an unconstitutional arrest, the federal courts may not grant habeas corpus relief to a state prisoner on the ground that evidence obtained therefrom was introduced at his trial. This is the rule of *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1967). *Stone* requires that an opportunity for full and fair adjudication of a fourth amendment claim be provided at some point by the state court. If the petitioner deliberately bypasses his state opportunity or knowingly waives his fourth amendment objections, federal habeas corpus relief is precluded. *O'Berry v. Wainwright*, 546 F.2d 1204, 1213-14 (5th Cir.), cert. denied 433 U.S. 911, 97 S.Ct. 2981, 53 L.Ed.2d 1096 (1977). Decisions subsequent to *O'Berry* indicate that "it is the existence of state processes allowing an opportunity for full and fair litigation of

counsel provided reasonably effective assistance. The case is remanded to the district court with directions to issue the writ of habeas corpus discharging Goodwin, subject to the state's right to retry him within a reasonable time. This time period shall be scheduled by the district court.

REVERSED AND REMANDED.

fourth amendment claims, rather than a defendant's use of those processes, that serves the policies underlying the exclusionary rule and bars federal habeas corpus consideration of claims under *Stone v. Powell*." *Williams v. Brown*, 609 F.2d 216, 220 (5th Cir. 1980), citing *Caver v. Alabama*, 577 F.2d 1188 (5th Cir. 1978). See also *Swicegood v. Alabama*, 577 F.2d 1322, 1324-25 (5th Cir. 1978). Because our holding is based on Goodwin's sixth amendment claim of ineffective assistance of counsel, however, we find *Stone v. Powell* and its Former Fifth Circuit progeny inapplicable. The *Stone* Court was genuinely concerned with the costs and benefits of the exclusionary rule. The primary justification for the exclusionary rule is the deterrent effect on constitutionally impermissible police activity. As *Stone* indicates, however, illegal police conduct is not likely to dissipate with the threat of having evidence ruled inadmissible five years later in a federal habeas corpus proceeding. Therefore, under principles of federal-state comity, the federal court is an inappropriate forum to determine whether a fourth amendment violation exists for purposes of exclusion when the opportunity for that same determination has been previously provided in the state courts. See *Stone*, 428 U.S. at 489-95, 96 S.Ct. at 3050-53; *O'Berry*, 546 F.2d at 1214 nn.15 & 16. We find nothing in this line of reasoning, however, that prevents a federal court from determining whether a defense has been adequately investigated and prepared and therefore, whether defense counsel was effective.